Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

DOUGLAS A. MAULER and JUDITH A. MAULER,

Petitioners,

v.

UNITED STATES OF AMERICA, BAYFIELD COUNTY, a political subdivision of the State of Wisconsin, and UNION PACIFIC RAILROAD COMPANY, a foreign railroad corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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78

QUESTIONS PRESENTED

The National Trails System Improvement Act of 1988, Public Law 100-170, 102 Stat. 2281 (1988), 16 U.S.C. § 1248 (c)-(f), requires that on or after October 4, 1988, title to "right of way of the type described in the Act of March 8, 1922 (43 U.S.C. § 912)" shall be vested in the United States for purposes of expanding the nation's system of recreational trails. The United States Court of Appeals for the Seventh Circuit held that this Act applies to a 100 foot strip of railroad right of way in Bayfield County, Wisconsin, traversing the petitioners' land abandoned before October 4, 1988 and which even the United States has disclaimed any right, title or interest in a quiet title action. The Court of Appeals decision in *Mauler v. Bayfield County* threatens to unsettle the title and ownership of more than 100,000 miles of railroad right of way abandoned prior to October 4, 1988 by raising a question whether the title is vested in the United States as "right of way of the type described in the Act of March 8, 1922 (43 U.S.C. § 912)" under 16 U.S.C. § 1248 (c)-(f). Certiorari should be granted by this Court to settle the following questions for review.

1. Does the National Trail System Improvement Act of 1988, Public Law 100-170, 102 Stat. 2281 (1988), 16 U.S.C. § 1248 (c)-(f) constitute a deprivation private property without due process of law in violation of the U.S. Constitution, Amendment V or Ex Post Facto legislation in violation of Article I, section 9, clause 3 of the U.S. Constitution?

2. Is a railroad right of way created by a prior conveyance or by the General Right of Way Act of 1875 "right of way of the type described in the Act of March 8, 1922 (43 U.S.C. § 912" and therefore owned by the United States under the

National Trail System Improvement Act of 1988, Public Law 100-170, 102 Stat. 2281 (1988), 16 U.S.C. § 1248 (c)?

3. Did the National Trail System Improvement Act of 1988 Public Law 100-170, 102 Stat. 2281 (1988), 16 U.S.C. § 1248 (c)-(f) impliedly repeal the Act of March 8, 1922, ch. 94, 42 Stat. 414 (43 U.S.C. § 912) and the May 25, 1920, ch. 197, 41 Stat. 621 (43 U.S.C. § 913)?

4. Is the conversion an abandoned railroad right of way to a recreational trail a taking without just compensation contrary to the U.S. Constitution, Amendments V and XIV?

5. Is an abutting landowner entitled to quiet title and just compensation against a local government claiming title to abandoned railroad right of way under the United States where the United States disclaims all right, title and interest in such right of way under the Quiet Title Act, 28 U.S.C. § 2409a?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. *Statutory Framework* 2

B. Historical and Factual Background 4

ARGUMENT 14

I. THE COURT OF APPEALS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT 14

A. The Court of Appeals Decision Conflicts With This Court's Interpretation of 43 U.S.C. § 912 in *Noble v. Oklahoma City*, 297 U.S. 481 (1936) 14

B. The Court of Appeals Decided This Case In Way Which Conflicts With Relevant Decisions of This Court Governing Retroactive Application and Implied Repeal of Statutes 19

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS AND THE HIGHEST COURTS OF SEVERAL STATES 24

III. CONCLUSION 26

APPENDIX

CIRCUIT COURT ORDER (10/31/02) 1a

DISTRICT COURT ORDER (12/4/01) 12a

ORDER DENYING REHEARING 36a

STATUTORY PROVISIONS INVOLVED 37a

TABLE OF AUTHORITIES

CASES

BARNEY V. BURLINGTON NORTHERN RAILROAD CO., 490 N.W.2D 726, 731 (S.D. 1992) 18, 25

CHOCTAW, O & G. R. CO. V. MACKEY, 256 U.S. 531, 538 (1921) 17

GREAT NORTHERN RAILROAD COMPANY V. UNITED STATES, 315 U.S. 242 (1942) 11, 18

GREAT NORTHERN RAILWAY CO. V. STEINKE, 261 U.S. 119, 131-132 (1923) 16

GREAT NORTHERN RAILWAY CO. V. UNITED STATES, 315 U.S. 262 (1942) 17

GREEN BAY AND MISSISSIPPI CANAL CO. V. HEWITT, 66 WIS. 461, 466, 29 N.W. 237, 238 (1886) 16

HILL V. WESTERN VERMONT RAILROAD, 32 VT. 68 (1859) 25

JAMESTOWN & NORTHERN RAILROAD CO. V. JONES, 177 U.S. 125, 130 (1900) 16

SCHULENBERG V. HARRIMAN, 88 U.S. 44, 60 (1875) 15

KREMER V. CHEMICAL CONSTRUCTION CORP., 456 U.S. 461, 468 (1982) 22

LANDGRAFF V. USI FILM PRODUCTS, 511 U.S. 244, 266-273 (1994) 21

LAWSON V. STATE, 107 WASH.2D 444, 730 P.2D 1308 (1986) 25

LYNCH V. UNITED STATES, 292 U.S. 571, 579 (1934) 17

MARSHALL V. CHICAGO & NORTHWESTERN TRANSPORTATION CO., 31 F.3D 1028, 1032 (10TH CIR. 1994) 18, 24

MAULER V. BAYFIELD COUNTY, 204 F. SUPP. 2D 1168, 1175-1176 (W.D. WIS. 2001) 1, 19

MAULER V. BAYFIELD COUNTY, 309 F.3D. 997, 999, 1002 (7TH CIR. 2002) 1, 19

MINNEAPOLIS, ST. PAUL & S. STE. MARIE RAILWAY CO. V. DOUGHTY, 208 U.S. 251, 259 (1908) 16

NOBLE V. OKLAHOMA CITY, 297 U.S. 481 (1936) 14, 15, 16, 17

NORTHERN PACIFIC RAILWAY CO. V. TOWNSEND, 190 U.S. 267 (1903) ..... *passim*

PHILLIPS CO. V. DENVER & RIO GRANDE WESTERN R. CO., 97 F.3D 1375 (10TH CIR. 1996) 24

POLLNOW V. STATE DEPT. OF NATURAL RESOURCES, 88 WIS.2D 350, 367, 276 N.W.2D 738, 746 (1979) .. 12, 16, 25

POSADAS V. NATIONAL CITY BANK, 296 U.S. 497, 503 (1936) 22

PRESEAULT V. UNITED STATES, 100 F.3D 1525, 1541-1544 (FED. CIR. 1996) 25

RADZANOWER V. TOUCHE ROSS & CO., 426 U.S. 148, 154 (1976) 22

RIO GRANDE WESTERN RAILWAY CO. V. STRINGHAM, 239 U.S. 44 (1915) 2, 17

RIVERS V. ROADWAY EXPRESS CO., 511 U.S. 298, 312-313 (1994) 14

STATE OF IDAHO V. OREGON SHORT LINE R.R. CO., 617 F. SUPP. 207, 212 (D.C. IDAHO, 1985) 18

TROY & BOSTON RAILROAD V. POTTER, 42 VT. 265 (1869) 25

UNION PAC R. CO. V. LARAMIE STOCK YARDS CO., 231 U.S. 190, 199 (1913) 21

UNION PAC R. CO. V. SNOW, 231 U.S. 204, 211-212 (1913) 21

UNITED STATES V. NORTHERN PACIFIC RAILROAD CO., 256 U.S. 51, 63-64 (1921) 17

UNITED STATES V. UNITED CONTINENTAL TUNA CORP., 425 U.S. 164, 168 (1976) 22

VIEUX V. EAST BAY REGIONAL PARK DIST., 906 F.2D 1330, 1341-1342 (9TH CIR. 1990) 21, 25

STATUTES

16 U.S.C. § 1248 (C) ..... *passim*

28 U.S.C. § 1254 1

28 U.S.C. § 2409A 25

28 U.S.C. § 2409A(E) 10

28 U.S.C. § 1331 ..... 9, 25

28 U.S.C. § 1346(F) 9, 26

28 U.S.C. § 1367 25

28 U.S.C. § 2201 9

28 U.S.C. § 2202 9

43 U.S.C. § 912 ..... *passim*

43 U.S.C. § 913 ..... *passim*

ACT OF APRIL 9, 1874 [18 STAT. 28, CH. 82 (1874) 5

ACT OF MARCH 8, 1922, CH. 94, 42 STAT. 414, 43 ..... 1, 2

ACT OF MAY 25, 1920, CH. 197, 41 STAT. 621, 43 1

GENERAL RIGHT OF WAY ACT OF 1875, CH. 152, 18 STAT. 482 (CODIFIED AT 43 U.S.C. §§ 934-939 REPEALED AND SUPERSEDED BY ACT OF OCTOBER 21, 1976, P.L. 94-579, 90 STAT. 2793) 2

NATIONAL TRAIL SYSTEM IMPROVEMENT ACT OF 1988, PUBLIC LAW 100-170, 102 STAT. 2281 (1988) 1, 3

STATE [11 STAT. 20 (1856) 5

STATE OF WISCONSIN [13 STAT. 66(1864) 5

WIS. STATS. § 85.09 8

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Douglas R, Mauler and Judith A. Mauler, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The district court's opinion (per Crabb, C.J.) granting respondent's motion for summary judgment (App. pp. 12a-35a) is reported at 204 F. Supp. 2d 1168 (W.D. Wis. 2001). The opinion of the Circuit Court of Appeals for the Seventh Circuit (App. pp. 1a-11a) is reported at 309 F.3d 997 (7th Cir. 2002).

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on October 31, 2002, and denied rehearing and rehearing en banc on November 25, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

Provisions of the Quiet Title Act, 28 U.S.C. § 1346 (f) and 2409a, the National Trail System Improvement Act of 1988, Public Law 100-170, 102 Stat. 2281 (1988), 16 U.S.C. § 1248, the Act of May 25, 1920, ch. 197, 41 Stat. 621, 43 U.S.C. § 913, relating to the authority of railroads to dispose of rights-of-way through the public lands, the Act of March 8, 1922, ch. 94, 42 Stat. 414, 43 U.S.C. § 912 (Federal Abandoned Railroad Right-of-Way Act 1922), relevant to this petition, are reprinted in the Appendix pp. 37a-43a.

The U.S. Constitution, Article I, section 9, clause 3 provides: No Bill of Attainder or ex post facto Law shall be passed." Amendment V provides: "No person . . . shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation." Amendment XIV, § 1 provides: No state shall make or enforce any law which shall abridge he privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; . . ."

STATEMENT OF THE CASE

A. Statutory Framework

The Act of March 8, 1922, ch. 94, 42 Stat. 414, 43 U.S.C. § 912, otherwise known as the Federal Abandoned Railroad Right of Way Act (FARRWA), (App. pp. 42a-43a) was adopted by Congress to dispose of reversionary interests which this Court had implied in decisions such as *Northern Pacific Railway Co. v. Townsend*, 190 U.S. 267 (1903) and *Rio Grande Western Railway Co. v. Stringham*, 239 U.S. 44 (1915).(construing the Northern Pacific Railroad land grant and the General Right of Way Act of 1875, ch. 152, 18 Stat. 482 (codified at 43 U.S.C. §§ 934-939 repealed and superseded by Act of October 21, 1976, P.L. 94-579, 90 Stat. 2793))./[1] According to the House Report of the Act of March 8, 1922:

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[1]Although Congress also enacted a general right of way act in 1852, 10 Stat. 28 (Aug. 4, 1852), this Act was limited to railroads actually formed and constructed within fifteen years of August 4, 1852.

> The object of this bill is to provide for disposition of lands embraced in forfeited or abandoned railroad rights of way on what was originally public lands. . . . Under the decisions of the courts railroad companies receiving such grants take a qualified fee with an implied condition of reverter in the event the companies cease to use the lands for purposes for which they were granted. Upon abandonment or forfeiture, therefore, of any portions of such right of way the land reverts to and becomes property of the United States.
>
> . . . .
>
> It seemed to the committee that such abandoned or forfeited strips are of little or no value to the Government and that in case of lands in the rural communities they ought in justice to become the property of the person to whom the whole of the legal subdivision had been granted or his successor in interest. Granting such relief in reality gives him only the land covered by the original patent.

See also S. Rep. No. 388, 67th Cong., 2d Sess. 2 (1922).

In 1988, Congress enacted the National Trails System Improvement Act of 1988 Public Law 100-170, 102 Stat. 2281 (1988), to amend 16 U.S.C. § 1248 adding the following provision (c):

> Commencing upon October 4, 1988, any and all right, title, interest, and estate of the United states in all rights-of-way of the type described in the Act of March 8, 1922

> (43 U.S.C. § 912), shall remain in the United States upon the abandonment or forfeiture of such rights-of-way, or portions thereof, except to the extent that any such right-of-way, or portion thereof, shall have been embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such Act.

16 U.S.C. § 1248 (d)-(f) provided for three classes of abandoned right of way: right-of-way located within the boundaries of "conservation system units" or a National Forest, right-of-way located outside of a National Forest or conservation system unit but adjacent to such Forest or unit and right-of-way outside but not adjacent to any National Forest or conservation system unit. Right-of-way within a National Forest or conservation unit was to be incorporated within the Forest or unit, but right-of-way outside whether or not it was adjacent or contiguous to such Forest or unit, was to be evaluated for suitability as a recreational trail or other recreational purposes which the Secretary of the Interior determines is appropriate. Abandoned right-of-way outside of National Forests and conservation system units and not adjacent or contiguous were subject to sale by the Secretary of the Interior with preference going to States and local units of government for purposes of development of recreational trails. App. pp. 37a-41a.

B. Historical and Factual Background

The present case arises out of a controversy involving the 1856 and 1864 special land grants "in aid of railroad construction" to the State of Wisconsin and in turn to the Chicago, St. Paul, Minneapolis & Omaha

Railroad Company (later the Chicago and Northwestern Transportation Company). The Act of June 3, 1856, entitled An Act granting Public Lands to the State of Wisconsin to aid in the Construction of railroads in said State [11 Stat. 20 (1856)] granted to the State of Wisconsin every alternate odd-numbered section of land for six sections in width on each of the road, declaring that the lands granted should be applied exclusively to the construction of the road and be subject to the disposal of the Wisconsin legislature and no other purpose. This railroad was to be routed from Madison or Columbus, Wisconsin, by way of Portage City to the St. Croix River or Lake between Townships twenty-five and thirty-one and from that point to the west end of Lake Superior and to Bayfield. The grant provided that the land could be sold in 120 section increments for each twenty miles of railroad actually constructed when the Governor of the State certified to the Secretary of the Interior that twenty miles were completed. If the road was not completed within ten years, then no further sales could be made and the unsold and would revert to the United States.

Congress extended the dates for completion of these railroads by the Act of May 5, 1864 entitled An Act granting Lands to aid in the Construction of certain railroads in the State of Wisconsin [13 Stat. 66(1864)] and again by Act of April 9, 1874 [18 Stat. 28, ch. 82 (1874)]. These Acts avoided the forfeiture of the land grants but the railroad were actually constructed by two companies after 1874, the Chicago, St. Paul, Minneapolis & Omaha Railroad Company (which became the Chicago and Northwestern Transportation Company) and the Wisconsin Central Railroad Company.

On February 14, 1884, the State of Wisconsin issued a patent to the Chicago, St. Paul, Minneapolis & Omaha Railway Company conveying 141, 712.87 acres of land or approximately 221.4 (640 acre) sections of land, including Section Thirty-five (35), Township 47, Range 6 West, Bayfield County, Wisconsin. Later that year, on November 30, 1884, the Chicago, St. Paul, Minneapolis & Omaha Railway Company conveyed to one John Canfield all of its right, title and interest of in all of a number of sections and fractional sections, including section Thirty-five (35), Township 47, Range 6 West, Bayfield County, Wisconsin. This conveyance was subject to the following reservation in the railroad (as party of the first part):

> The said party of the first part, however, hereby expressly reserves unto itself, its successors and assigns forever, the rights to occupy a strip of land 100 feet in width through, over, and across the premises granted as aforesaid, or any part thereof, the said strip to be included within two lines, each parallel with, and distant 50 feet from, the center line of the railway of the party of the first part, as the same is now constructed and operated, or as the same may hereafter be located, constructed and operated.

The Chicago, St. Paul, Minneapolis & Omaha Railway Company, which subsequently became the Chicago & Northwestern Transportation Company, operated a railroad on the strip of land until February 28, 1978, when the Interstate Commerce Commission granted approval to abandon the line.

The petitioners, Douglas R. Mauler and Judith A. Mauler (petitioners or "Maulers"), acquired legal ownership of two parcels of land totaling approximately fifty acres of land in Keystone Township, Bayfield County, Wisconsin, between November 14, 1994 and March 14, 1996. Their two parcels are legally described as:

> South 200 feet of the Southeast One-Quarter (SE ¼) of the Northeast One-Quarter (NE ¼), Section Thirty-five (35), Township Forty-seven (47), North Range Six (6) West; and
>
> North 460 feet of the Northeast Quarter (NE ¼) of the Southeast Quarter (SE ¼), Section Thirty-five (35), Township Forty-seven (47), North Range Six (6) West.
>
> The Southeast ¼ of the Northeast ¼, Except the South 200 feet thereof, less rights of way of record, Section 35, Township 47 North, Range 6 West, in the Town of Keystone, Bayfield County, Wisconsin.

Being in Section 35, the Maulers' land was part of the lands conveyed to John Canfield by the Chicago, St. Paul, Minneapolis & Omaha Railway Company from the "odd-numbered" sections granted to the State of Wisconsin "in aid of railroad construction." The Maulers' land was traversed by a 100 foot wide segment of the Chicago and Northwestern Transportation Company's right of way which extended from railroad Milepost 104.0 near Hayward, Wisconsin in Sawyer County to railroad Milepost 157.18 near Ashland

Junction, near Bayfield, Wisconsin in Bayfield County and from railroad Milepost 166.0 at Washburn to railroad Milepost 178.28 at Bayfield, altogether a total of 65.46 miles. The Interstate Commerce Commission granted approval for abandonment of this segment of the Chicago and Northwestern Transportation Company line by a decision dated February 24, 1978, (Service date March 1, 1978 in AB-1, Sub-No. 29). After the Interstate Commerce Commission approved abandonment of the line in 1978, the railroad removed the railroad tracks, ties and other appurtenances of the rail line. On July 3, 1986 the State of Wisconsin Department of Transportation issued a Statement of Release of Interest Under Section 85.09, Wis. Stats. which declared the line abandoned and released the right of way from any further obligation for public use under the Wisconsin rail banking act, Wis. Stats. § 85.09.

On May 25, 1989, the Chicago and Northwestern Transportation Company executed and delivered a quitclaim deed to the Bayfield County Snowmobile Alliance, Inc., a nonprofit corporation, including all of its interest in specified portions of a railroad right-of-way extending through the townships of Cable, Drummond, Grand View, Mason, Keystone, and Pilsen in Bayfield County. This deed was recorded June 22, 1989. On June 28, 1989, the Bayfield County Snowmobile Alliance, Inc. executed a quitclaim deed to Bayfield County of the same described strip of land. This deed was recorded June 29, 1989. Thereafter, Bayfield County purported to establish a snowmobile trail on the strip of land.

The Maulers, after becoming aware of the County's purported claim to the 100 foot strip, attempted to block the trail by erecting a five foot high

wooden barrier on the cleared path across the strip to prevent people from driving snowmobiles and all-terrain vehicles and hunting on their land. Bayfield County then commenced an action on October 27, 1998 in Bayfield County Circuit Court for declaratory judgment and injunction to establish that the conveyance from the Bayfield County Snowmobile Alliance, Inc. constituted a legally valid interest in a public snowmobile trail. The circuit court granted a motion for summary judgment to Bayfield County declaring that the County had a legally valid interest in the 100 foot strip of land "until a court of competent jurisdiction or an Act of Congress declared the right-of-way abandoned under 43 United States Code § 912." The Circuit Court refused to make a determination that the right-of-way had been abandoned and granted summary judgment to Bayfield County on September 3, 1999, declaring that Bayfield County had a legally valid interest in the strip of land. The Wisconsin Court of Appeals affirmed in an unpublished decision dated August 15, 2000, refusing to consider the Plaintiffs' arguments that 43 U.S.C. § 912 did not apply to the right-of-way on the ground that the issue had not been raised before the circuit court. The Wisconsin Supreme Court denied a petition for review.

The Maulers then commenced the present action in the United States District Court for the Western District of Wisconsin. The district court's jurisdiction was founded on the Quiet Title Act of 1972, 28 U.S.C. §§ 1346 (f) and 2409a, seeking to quiet title against the United States. Jurisdiction was also founded upon 28 U.S.C. §§ 1331, 2201 and 2202 involving a claim under the Constitution, laws and statutes of the United States for a declaration of abandonment and such further relief, including a declaratory judgment, that the actions of Bayfield County constituted a "taking". The

petitioners named as parties defendant the United States Department of the Interior-Bureau of Land Management, the Union Pacific Railroad Company, successor to the Chicago & Northwestern Transportation Company, which had reserved to itself mineral interests in the conveyance to the Bayfield County Snowmobile Alliance, Inc. and Bayfield County.

The United States Department of the Interior-Bureau of Land Management filed an answer as did Bayfield County and the Union Pacific Railroad but prior to the case being submitted for summary judgment, the United States Department of the Interior-Bureau of Land Management filed a disclaimer of interest and a motion to dismiss under 28 U.S.C. § 2409a(e) in the 100 foot strip of land. The district court entered an order dismissing the United States as a party and set up a briefing schedule for motions on summary judgment.

The court then granted Bayfield County's motion for summary judgment on December 4, 2001. App. pp. 12a-35a. The central point of the district court's decision was that the 1856 and 1864 land grants to the State of Wisconsin were no different from the "right-of-way" grant to the Northern Pacific Railway Company construed by the United States Supreme Court in *Northern Pacific Railway Company v. Townsend*:

> The Supreme Court has characterized the nature of land grants made to the railroads before 1871 as "limited fee, made on implied condition of reverter in the event the company ceases to use or retain the land for the purpose for which it was granted." *Northern Pacific Railway Co. v.*

Townsend, 190 U. S. 267, 271 (1903); *see also Great Northern Railroad Company v. United States*, 315 U.S. 242 (1942). *(distinguishing between* limited grants before 1871 and easements after 1871). In *Townsend*, 190 U.S. at 271, the grant did not state that it conveyed a "right-of-way" to the railroad. Instead, the grant contained a statement that the land could be used by the railroad only for the limited purpose of constructing and operating a railroad. The Court recognized that the United States has an interest in maintaining corridors for public transportation purposes. *Id.* The Court reasoned that because the railroad held a limited fee that it could not alienate in its discretion, the plaintiffs could not obtain an absolute, unlimited fee by adverse possession against the railroad.

As in *Townsend*, the land grant under which the strip in this case was conveyed to the railroad was made for the limited purpose of constructing and operating a railroad. The grant states that the lands "shall be exclusively applied to the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever." Further, the grant recognized the long term interest in the transportation corridor by limiting the manner in which the states could dispose of the federal and by stating that they

> "shall be and remain public highways." From the purpose of the grant and the conditions attached to the grant, I conclude that the United States intended to retain a reversionary interest in the strip just as in *Townsend*.

App. pp. 25a-26a. Although the district court held that the 100 foot strip was governed by 43 U.S.C. §§ 912 and 913, as well as 16 U.S.C. § 1248 (c), it refused to make a "declaration or decree of abandonment" on the grounds that the Maulers, as nonowners, lacked standing to make such a request. App. pp. 3a-35a. Nevertheless, the court found that the strip of land had been embraced within a "public highway" by common law dedication of the former right-of-way by the railroad to a snowmobile trail. App. pp. 28a-31a. The court rejected the Maulers' arguments that the right-of-way had reverted to them as abutting landowners under the Wisconsin Supreme Court case of *Pollnow v. State Dept. of Natural Resources*, 88 Wis.2d 350, 367, 276 N.W.2d 738, 746 (1979). It also rejected arguments that the establishment of the snowmobile trail constituted a "taking" of the appellants' land because the appellants never owned the land. App. pp. 27a-28a.

On appeal, the United States Circuit Court of Appeals for the Seventh Circuit affirmed, holding that the district court had not erred in applying 16 U.S.C. § 1248 (c), 43 U.S.C. § 912 and 43 U.S.C. § 913 to the Maulers' land. The Court rejected the distinction between "right of way grants" and "grants in aid of railroad construction":

> We find this distinction to be without a difference. Nothing in the *Townsend*

> opnion suggests the Court intended to distinguish between a land grant for a "right of way . . . for the construction of a railroad"(the *Townsend* grant) and a land grant "for the purpose of aiding the construction of a railroad"(the grant in this case). Rather, the *Townsend* Court decided that Congress made all of the railroad grants "in order that the obligations to the United States, assumed in the acceptance of the grants, might be performed." 190 U.S. at 272, . . . Because the land grants in the present case were comprised of federal lands in the public domain and were given for exactly the same purpose as the grant in *Townsend*, we readily conclude that the strip of land at issue here was subject to an implied right of reverter in the United States.

App. p. 7a. In short, the Court, ignoring the language of the land grants and the Mauler's chain of title, ruled simply that the Maulers did not own the 100 foot strip of land:

> Applying these federal statutes to the land in this case, we find that § 912, as modified by § 1248 (c), vests a reversionary interest in the strip in the United States and not the Maulers. When the Railroad conveyed the strip to Bayfield County and Bayfield County established a public highway on the land as required by § 913, the United States reversionary interest expired in favor of Bayfield County. In short, the Maulers never possessed a legal interest in

the former railroad corridor.

App. p. 8a.

The Maulers filed a petition for rehearing and rehearing *en banc* on November 13 , 2002, which petition was denied on November 25, 2002. App. p. 36a.

I. THE COURT OF APPEALS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

A. The Court of Appeals Decision Conflicts With This Court's Interpretation of 43 U.S.C. § 912 in *Noble v. Oklahoma City*, 297 U.S. 481 (1936).

It is fundamental that once this Court has construed a statute, it is the duty of lower courts to respect that understanding of the rule of law. *Rivers v. Roadway Express Co.*, 511 U.S. 298, 312-313 (1994). Although this Court has previously construed the Act of March 8, 1922 (43 U.S.C.§ 912) in *Noble v. Oklahoma City*, 297 U.S. 481 (1936), the Court of Appeals did not even mention this decision but relied instead upon *Northern Pacific Railway Co. v. Townsend*, 190 U.S. 267, 271 (1903), decided 19 years before 43 U.S.C. § 912 was even enacted.

The issue in *Noble v. Oklahoma City* was whether a right of way, which had been acquired by the Choctaw Coal and Railway Co. pursuant to a grant from Congress to locate, construct, own, equip, operate, use and maintain a railway, was subject to 43 U.S.C. § 912 allowing a municipality to acquire such right of way upon abandonment by the railroad. The owners of land

abutting the right of way challenged Oklahoma City's right to acquire the right of way presented deeds which had conveyed the right of way to railroad "in lieu of condemnation." The Oklahoma Supreme Court had held that the Act of Congress, dated February 18, 1888, vesting the railroad with the right to locate and construct a railroad was a grant *in praesenti* (a present grant) which predated the homestead claims of the abutting landowners.[2] On appeal, this Court reversed, specifically stating that the Act of March 8, 1922 applied only to right of way acts which "explicitly state that 'a right of way is hereby granted.'" *Noble v. Oklahoma City*, 297 U.S. at 490-491. The Court cited those grants which named specific railroads or states, such as the Illinois Central, the Northern Pacific, St. Joseph & Denver City Railroad Co., Union Pacific and others. *Noble v. Oklahoma City*, 297 U.S. at 491, fn. 17.

The Court explicitly excluded from 43 U.S.C. § 912 right of way under the Act of February 18, 1888, which it concluded was a "franchise" which authorized the taking of lands from landowners "in lieu of condemnation" upon payment of just compensation and right of way acquired from the public domain under the General Right of Way Act of 1875, ch. 152, 18 Stat. 482 (codified at 43 U.S.C. §§ 934-939 repealed and superseded by Act of October 21, 1976, P.L. 94-579, 90 Stat. 2793). *Noble v. Oklahoma City*, 297 U.S. at 490-491,

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[2] Grants were *in praesenti*, where they "related back" to the date of the Act of Congress itself. *See e.g. Northern Pacific Railway Co. v. Townsend*, 190 U.S. 267, 271 (1903). Thus, even though the profile map for the Northern Pacific road was not filed until 1884 and construction not completed until 1887, the date of grant of the Northern Pacific right of way was July 2, 1864.*Compare Schulenberg v. Harriman*, 88 U.S. 44, 60 (1875).

494-495. Right of way acquired from the public domain under these Acts because none were *in praesenti*,(from the date of an Act of Congress), but instead dated from the filing of the profile map or actual construction of the road. *Noble v. Oklahoma City*, 297 U.S. at 494-495. *See also Jamestown & Northern Railroad Co. v. Jones*, 177 U.S. 125, 130 (1900); *Great Northern Railway Co. v.* Steinke, 261 U.S. 119, 131-132 (1923); *Minneapolis, St. Paul & S. Ste. Marie Railway Co. v. Doughty*, 208 U.S. 251, 259 (1908). Because the right of way under consideration in *Noble* had not been granted *in praesenti*, it was not subject to the Act of March 8, 1922, 43 U.S.C. § 912 and therefore Oklahoma City could not acquire title to abandoned right of way under the "municipality exception" to 43 U.S.C. § 912.

The present case involves lands from the Wisconsin land grants of 1856 and 1864, which, like the Act of February 18, 1888 in *Noble v. Oklahoma City* included no grant of right of way. The right of way in the present case was not actually constructed until after 1874. If there was any acquisition of right-of-way, it would have been under the General Right of Way Act of 1875. The record in the present case establishes that the right of way was acquired by a reservation in a deed to John Canfield, not that it was not taken from the public domain. Such a reservation in a deed created an easement under state law. *Pollnow v. State Dept. of Natural Resources*, 88 Wis.2d 350, 367, 276 N.W.2d 738, 746 (1979); *Green Bay and Mississippi Canal Co. v. Hewitt*, 66 Wis. 461, 466, 29 N.W. 237, 238 (1886). There was no *in praesenti* grant of right of way which would bring the present grant within 16 U.S.C. § 1248 (c) as "right of way of the type described in the Act of March 8, 1922 (43 U.S.C. § 912)." The Court of Appeals's disregard of this Court's interpretation of 43 U.S.C. § 912

in *Noble v. Oklahoma City* operated to deny to the petitioners due process of law and worked a taking of their property without just compensation, impairing the grant of lands to them as successors to the railroad which had earned the grant by constructing the railroad. *United States v. Northern Pacific Railroad Co.*, 256 U.S. 51, 63-64 (1921). *See also Lynch v. United States*, 292 U.S. 571, 579 (1934).

The Court of Appeals also prejudicially misapplied this Court's decision in *Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942). The Court of Appeals corrected recognized that in *Great Northern Railway Co.*, the Court drew a distinction between pre-1871 grants of right of way, which continued to be recognized as "limited fee subject to an implied condition of reverter"and post-1871 grants of right of way which were recognized as "easements. " That distinction between pre- and post-1871 grants was irrelevant to the Court's interpretation of 43 U.S.C. § 912. The Court did not overrule *Noble v. Oklahoma City* in *Great Northern Railway Co. v. United States* but only held that statements in *Rio Grande Western Railway Co. v. Stringham*, 239 U.S. 44, 47 (1915), *Choctaw, O & G. R. Co. v. Mackey*, 256 U.S. 531, 538 (1921) and *Noble v. Oklahoma City*, 297 U.S. 481, 494 (1936) that the 1875 Act had granted a "limited fee subject to an implied condition of reverter" were wrong.

On the other hand, by erroneously assuming that there were *no* distinctions between rights of way acquired from the public domain, the Court of Appeals resurrected the very interpretation of the General Right of Way Act of 1875 as a "limited fee simple subject to an implied right of reverter" which this Court overruled in *Great Northern Railway Co. v. United States*, 315 U.S.

at 279. The Court of Appeals erroneously reasoned that *failing* to make a distinction between and post-1871 grants would somehow nullify the intent of Congress in enacting 43 U.S.C. §§ 912 and 913 and 16 U.S.C. § 1248 (c). The Court of Appeals reasoned that:

> Clearly Congress assumed the United States possessed a reversionary interest in railroad rights of way, else it would make little sense for Congress to have passed laws like §§ 912, 913 and § 1248 (c) to dispose of land the federal government did not own.

App. 8a. *Compare Marshall v. Chicago & Northwestern Transportation Co.*, 31 F.3d 1028, 1032 (10th Cir. 1994); *State of Idaho v. Oregon Short Line R.R. Co.*, 617 F. Supp. 207, 212 (D.C. Idaho, 1985); *Barney v. Burlington Northern Railroad Co.*, 490 N.W.2d 726, 731 (S.D. 1992) (all construing 43 U.S.C. § 912 as including easements under the 1875 General Right of Act "to avoid nullifying the intent of Congress"). This reasoning makes no sense since obviously if all right of way except "*in praesenti* right of way grants" of the Northern Pacific and Union Pacific type are excluded from 43 U.S.C. § 912, the statute would still be operational to those right of way. The Court of Appeals fear of nullifying the intent of Congress was clearly not a logical or lawful reason for disregarding this Court's interpretation of 43 U.S.C. § 912 in *Noble v. Oklahoma* City. The Court of Appeals decided in a way which conflicts with this Court's interpretation of the Act of March 8, 1922 (43 U.S.C. § 912). Other courts have likewise disregarded this interpretation. Certiorari should be granted to resolve this important issue of federal law.

B. The Court of Appeals Decided This Case In Way Which Conflicts With Relevant Decisions of This Court Governing Retroactive Application and Implied Repeal of Statutes.

The District Court and the Court of Appeals both construed 16 U.S.C. § 1248 (c) as having "modified", but not repealed, 43 U.S.C. §§ 912 and 913. *Mauler v. Bayfield County*, 204 F. Supp. 2d at 1175-1176; *Mauler v. Bayfield County*, 309 F.3d. At 999, 1002. This reasoning sidestepped the irreconcilable conflict between 16 U.S.C. § 1248 (c) on the one hand and 43 U.S.C. §§ 912 and 913 on the other, and the actual language of 16 U.S.C. § 1248 (c) which Congress clearly intended to apply only prospectively from October 4, 1988. The National Trails System Improvement Act of 1988 provides in 16 U.S.C. § 1248 (c):

> ***Commencing upon October 4, 1988***, any and all right, title, interest, and estate of the United states in all rights-of-way of the type described in the Act of March 8, 1922 (43 U.S.C. § 912), ***shall remain in the United States upon the abandonment or forfeiture of such rights-of-way, or portions thereof***, except to the extent that any such right-of-way, or portion thereof, shall have been embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such Act. (emphasis added).

The 100 foot strip of land traversing the petitioners' land was abandoned as a right of way as of July 3, 1986. App. 16a. Thus, as of October 4, 1988, the right of way had

already been abandoned for more than two years. The Chicago & Northwestern Transportation Company did not make any conveyance until May, 1989, which is more than one year after abandonment. Even assuming the Act of March 8, 1922 (43 U.S.C. § 912) applies to the 100 foot strip, the Act itself makes the date of ***abandonment*** the date from which any other nonrailroad public use must be commenced. The relevant language of 43 U.S. C. § 912 provides that:

> Whenever . . . ***use and occupancy*** of said [public] lands for such [right of way] purposes ***has ceased or shall hereafter cease***, whether by forfeiture or ***by abandonment by said railroad company declared*** or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest and estate of the United States in said lands shall, ***except such part thereof*** as may embraced in a public highway legally established ***within one year after the date of said*** decree or forfeiture or ***abandonment be transferred to and vested in any person, firm, or corporation, assigns, successors in title and interest to whom or to which title of the United States may have been or may be granted conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures***. . . . (emphasis added).

Vieux v. East Bay Regional Park Dist., 906 F.2d 1330, 1341-1342 (9th Cir. 1990). No public highway was established on the 100 foot strip within one year of July 3, 1986. Therefore, even assuming the Act of March 8, 1922 applied to the 100 foot strip of land, the petitioners would have been entitled to ownership upon abandonment as abutting landowners and as successors to the original grantee of the abutting land.

The Court of Appeals therefore construed 16 U.S.C. § 1248 (c) in a way which conflicts with decisions of this Court that "legislation must be considered as addressed to the future, not to the past." *Union Pac R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913); *Union Pac R. Co. v. Snow*, 231 U.S. 204, 211-212 (1913). *See Landgraff v. USI Film Products*, 511 U.S. 244, 266-273 (1994). Congress clearly did not intend the National Trail System Improvements Act of 1988, 16 U.S.C. § 1248 (c), to operate retroactively by including previously abandoned right of way into the National Trail System. Moreover, Congress clearly did not intend to bring "right of way" which was not previously identified as "right of way of the type described in the Act of March 8, 1922 (43 U.S.C. § 912)" under federal ownership.

On the other hand, the National Trail System Improvements Act of 1988, 16 U.S.C. § 1248 (c) does clearly manifest an intent by Congress to repeal 43 U.S.C. §§ 912 and 913 prospectively from October 4, 1988 by vesting all railroad "right of way of the type described in the Act of March 8, 1922 (43 U.S.C. § 912)" abandoned or forfeited **after** October 4, 1988 in the United States. Congress intended to leave unaffected all "right of way of the type described in the Act of March 8, 1922 (43 U.S.C. § 912)" abandoned or forfeited **prior** to

October 4, 1988 "except to the extent that any such right-of-way, or portion thereof, shall have been embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such Act." Congress did not intend to allow "right of way of the type described in the Act of March 8, 1922 (43 U.S.C. § 912)" to be used for "public highways" but rather intended such right of way to be used for recreational trails where the Secretary of the Interior deems such use suitable. 16 U.S.C. § 1248 (d)-(f).

Although repeals by implication are not favored," *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976), and whenever possible, statutes should be read consistently. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 468 (1982), this Court has recognized:

> . . . two well-settled categories of repeals by implication - (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest. . . . .

Id. citing Radzanower v. Touche Ross & Co., 426 U.S. at 154, and *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). There is an irreconcilable conflict

between 16 U.S.C. § 1248 (c) and 43 U.S.C. §§ 912 and 913: land whose ownership is vested in the United States cannot be vested in either the abutting landowner or another person at the same time. Moreover, 16 U.S.C. § 1248 (c) covers the whole subject of "right of way of the type described in the Act of March 8, 1922 (43 U.S.C. § 912)", which by reference encompasses "right of way" dedicated to public highway use under 43 U.S.C. § 913. After October 4, 1988, Congress intended to substitute a policy of devoting such abandoned federal railroad right of way to recreational trail use rather than public highway use. These sections reveal a "clear and manifest intent" by Congress to repeal 43 U.S.C. §§ 912 and 913.

The district court wondered how repeal of 43 U.S.C. § 912 would benefit petitioners. App. pp. 23a-24a. If Congress clearly intended to prospectively repeal 43 U.S.C. §§ 912 and 913, previously abandoned or forfeited rights of way not embraced in a legally established public highway prior to October 4, 1988 would be left to the abutting landowners. Congress clearly did not intend to unsettle titles which had been previously vested according to the Act. This can be inferred from the exception in 16 U.S.C. § 1248 (c) for "any such right-of-way, or portion thereof, thereof, [which] shall have been embraced within a public highway no later than one year after a determination of abandonment or forfeiture". As to these rights of way, 16 U.S.C. § 1248 also provides that it shall be "as provided under such Act (of March 8, 1922 (43 U.S.C. § 912))". The Act of March 8, 1922 called for the public highway to be "legally established ***within one year after the date of said*** decree ***or*** forfeiture ***or abandonment***." Where such public highway had not been legally established within one year of abandonment, Congress clearly intended landowners such as the petitioners to

retain title in the right of way by virtue of the ownership in the abutting subdivision. Thus, petitioners are benefitted by a repeal of the 43 U.S.C. § 912 even if the 100 foot strip of land is "right of way of the type described in the Act of March 8, 1922 (43 U.S.C. § 912)" because the 100 foot strip of land was abandoned prior to October 4, 1988 when 16 U.S.C. § 1248 (c) took effect.

The Court of Appeals decided the case in a way which conflicts with decisions of this Court governing statutory interpretation. Had these decisions been followed, the Court would have quieted title to the 100 foot strip of land in the petitioners, not the United States. The United States evidently agreed with this interpretation since it disclaimed all right, title and interest and was dismissed by the district court before the case was submitted for summary judgment. Certiorari should therefore be granted to correct the Court of Appeals blatant misinterpretation of important federal law.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS AND THE HIGHEST COURTS OF SEVERAL STATES

The Court of Appeals decision in *Mauler v. Bayfield County*, App. pp. 1a-11a conflicts with the Tenth Circuit Court of Appeals decision in *Marshall v. Chicago & Northwestern Transp. Co.*, 31 F.3d 1028, 1030 (10th Cir. 1994) vesting title to such right of way in the abutting landowners even though the right of way was abandoned after October 4, 1988. Both of these cases conflict with the Tenth Circuit's decision in *Phillips Co. v. Denver & Rio Grande Western R. Co.*, 97 F.3d 1375 (10th Cir. 1996) holding that abandonment could not occur under 16 U.S.C. § 1248 (c) or 43 U.S.C.

§§ 912 and 913 unless and until the Interstate Commerce Commission approved such abandonment. The Tenth Circuit Court of Appeals decision in *Phillips Co. v. Denver & Rio Grande Western R. Co.*, conflicts in this regard with the Ninth Circuit Court of Appeals in *Vieux v. East Bay Regional Park Dist.*, 906 F.2d 1330, 1339 (9th Cir. 1990) holding that "a railroad could abandon without any involvement of the I.C.C., the U.S. or a state government." *Accord*: *Barney v. Burlington Northern Railroad Co.*, 490 N.W.2d 726, 732 (S.D. 1992).

The Court of Appeals decision in *Mauler v. Bayfield County* also conflicts with a decision of the Federal Circuit Court of Appeals in *Preseault v. United States*, 100 F.3d 1525, 1541-1544 (Fed. Cir. 1996). *Although the Preseault* case was decided on the basis of Vermont law on railroad right of way, the Federal Circuit held that the "shifting public use doctrine" was also rejected under Wisconsin law. *Preseault v. United States*, 100 F.3d at 1541-1544 applying Vermont law which is identical to Wisconsin and Washington state law. *Hill v. Western Vermont Railroad*, 32 Vt. 68 (1859); *Troy & Boston Railroad v. Potter*, 42 Vt. 265 (1869); *Lawson v. State*, 107 Wash.2d 444, 730 P.2d 1308 (1986); *Pollnow v. State Dept. of Natural Resources*, 88 Wis.2d 350, 276 N.W.2d 738 (1979). *Mauler v. Bayfield County* adopts a "shifting public use doctrine" contrary to *Preseault* and Wisconsin law where the land is situated. The Maulers are entitled to just compensation from the United States under 28 U.S.C. § 2409a (b) and from Bayfield County under 28 U.S.C. §§ 1331 and 1367 by reviewing the Mauler's rights as abutting land owners under state law just as in *Preseault*. This Court should grant certiorari to resolve this conflict between the circuits not only as to the important issue of interpreting statutes but also as to the issue of whether the "shifting

public use doctrine" is a justification for avoiding just compensation under the Fifth and Fourteenth Amendments to the U.S. Constitution.

III. CONCLUSION

Therefore, Petitioners Douglas R. Mauler and Judith A. Mauler, respectfully request that this Court invite the Solicitor General of the United States to comment on how the Department of the Interior could disclaim any right, title and interest in the 100 foot strip of land on their property when the Court of Appeals held that title to such property vested in the United States. The Maulers respectfully request that the Court grant their Petition for Certiorari to the United States Court of Appeals for the Seventh Circuit.

RESPECTFULLY SUBMITTED,

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(Any footnotes trail the end of each document.)
No. 02-1358

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DOUGLAS A. MAULER and JUDITH A. MAULER,
Plaintiffs-Appellants,

v.

BAYFIELD COUNTY, a political subdivision
of the State of Wisconsin,
Defendants-Appellees.

September 17, 2002, Argued

October 31, 2002, Decided

COUNSEL:
For DOUGLAS R. MAULER, JUDITH A. MAULER, Plaintiffs - Appellants: Jon E. Kingstad, Woodbury, MN.

For BAYFIELD COUNTY, WISCONSIN, Defendant - Appellee: Richard K. Nordeng, STAFFORD ROSENBAUM, Madison, WI USA.

For Rails to Trails, Amicus Curiae: Charles H. Montagne.

JUDGES:
Before FLAUM, Chief Judge, and EASTERBROOK and RIPPLE, Circuit Judges.

OPINIONBY:
FLAUM

OPINION:

FLAUM, Chief Judge. Douglas and Judith Mauler appeal the district court's finding that they hold no legal title or interest in a railroad right of way crossing their private property. The Maulers claim the former railway corridor was not a "right of way" subject to disposition under federal law and insist they have a valid reversionary interest in the land which has been unconstitutionally taken by Bayfield County. For the following reasons, we affirm the grant of summary judgment against the Maulers.

I. BACKGROUND

Douglas and Judith Mauler claim title to part of an old railroad corridor that crosses their private property. The 100-foot wide strip of land once functioned as a railroad operated by the Union Pacific Railroad Company n1 ("Railroad") and now serves as a public recreational and snowmobile trail maintained by the Bayfield County Tourism and Recreation Department. The Railroad ceased using the strip as a working railroad in 1978 and conveyed its interest in the land to Bayfield County by way of the Bayfield County Snowmobile Alliance in 1989.

When the Maulers purchased their land in 1994 and 1996, they took title "subject to and together with all easements, restrictions, reservations, and exceptions as may constitute or otherwise affect the chain of title to said premises" and "less any rights of way of record." The chain of title to the Maulers' land shows that the Railroad originally conveyed the parcel–expressly reserving the railroad right of way–to a John Canfield in 1884. Although the deeds explicitly reserved the railroad right of way and Bayfield County had been using the strip as a public trail for several years, the Maulers claimed exclusive ownership of the land. Resorting to self-help, they attempted to block public access to the

trail by building a five-foot high wooden barrier across the path near its entrance to their private property.

After unidentified persons removed the fence and the Maulers rebuilt it, Bayfield County sued the Maulers in Wisconsin state court to resolve the title dispute. The state court found Bayfield County held a valid interest in the land and permanently enjoined the Maulers from blocking the trail. The Maulers then filed essentially the same lawsuit against Bayfield County in federal district court. Bayfield County chose not to raise the affirmative defense of issue preclusion and sought a ruling on the merits because it wanted to establish the legal status of the trail as it passed through private property owned by the Maulers and others.

The original land grants in this case were part of a major initiative by the federal government to aid and encourage private companies in the building of railroads across frontier lands. As Congress dispersed grants of public lands to railroad companies and settlers claimed the same public lands as homesteads, disputes arose regarding the nature of and property rights associated with the railroad grants. In what continues to be the controlling case on point, the Supreme Court characterized these railroad grants as "limited fees, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted." Northern Pacific Ry. Co. v. Townsend, 190 U.S. 267, 271, 47 L. Ed. 1044, 23 S. Ct. 671 (1903).

In 1922 Congress enacted 43 U.S.C. § 912, known as the Abandoned Railroad Right of Way Act, to dispose of the abandoned railroad lands to which the United States held a right of reverter under Townsend. Section 912 requires that public lands given by the United States for use as railroad rights of way be turned into public highways within one year of their abandonment or be

given to adjacent landowners. n2 However, the National Trails System Improvement Act of 1988, 16 U.S.C. § 1248(c), modifies § 912 to the extent that now those lands not converted to public highways within one year revert to the United States and not private landowners. n3 In conjunction with § 912, 43 U.S.C. § 913 permits railroad companies to convey their public land grants to states, counties, or municipalities for use as public highways or streets. n4

The Maulers claim the United States did not retain a reversionary interest when it gave the land in question to Wisconsin in 1856 and 1864 "for the purpose of aiding in the construction of a railroad." n5 They also contend that neither Townsend nor subsequently enacted federal laws, namely 43 U.S.C. § § 912, 913 and 16 U.S.C. § 1248(c), apply in this case to create a reversionary interest in the United States because the original grant of land to Wisconsin did not use the exact words "right of way." Instead, the Maulers assert that they hold a valid reversionary interest in the strip which vested in them, as successors in interest to John Canfield, when the Railroad ceased using the land as a railway. They further argue that the Railroad's conveyance of the strip to Bayfield County by way of the Snowmobile Alliance and Bayfield County's dedication of the strip as a public recreational trail are both invalid.

On cross-motions for summary judgment, the district court held that the former railway corridor was a "right of way" subject to disposition under 43 U.S.C. § 912, as modified by 16 U.S.C. § 1248(c), that Bayfield County properly acquired title to the strip from the Railroad pursuant to 43 U.S.C. § 913, and that the Maulers lacked standing to pursue their takings claim because they never held a valid legal interest in the railway corridor.

II. DISCUSSION

We review the district court's grant of summary judgment de novo. Summary judgment is proper only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In determining whether a genuine issue of material fact exists, we view all facts and draw all inferences in favor of the nonmovant. Outlaw v. Newkirk, 259 F.3d 833, 836 (7th Cir. 2002). If the record as a whole "could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (internal quotations omitted).

The Maulers raise two issues in this appeal. First, they argue the district court erred in finding that the original federal land grants to the Railroad were rights of way with an implied right of reverter to the United States and that the Railroad properly disposed of its interest in the strip according to 43 U.S.C. § 913 and 43 U.S.C. § 912, as modified by 16 U.S.C. § 1248(c). Second, the Maulers claim they hold a valid legal interest in the land which entitles them to compensation from Bayfield County's "taking" of the former railroad corridor for public use as a recreational trail. Because we agree with the district court that 43 U.S.C. § § 912, 913 and 16 U.S.C. § 1248(c) apply to the strip and the Railroad conveyed the land to Bayfield County in accordance with these statutes, we conclude the Maulers hold no present or reversionary legal interest in the land. And since the Maulers do not own the land, they cannot prevail on their takings claim.

The Maulers argue that 43 U.S.C. § § 912, 913 and 16 U.S.C. § 1248(c) do not apply to the former railroad corridor and the land is not subject to reversion to the United States because it is not a "right of way" within the meaning of the statutes. Instead, the Maulers invoke a state common law precedent which they read as automatically vesting title to the strip in them as adjoining landowners upon its abandonment by the Railroad. n6 See Pollnow v. State Dept. of Natural Resources, 88 Wis. 2d 350, 276 N.W.2d 738 (Wis. 1979) (holding in case where railroad grant was an easement and not a right of way that title vested in abutting landowner once railroad abandoned land). The Maulers' argument fails for two reasons. First, unlike Pollnow, the original grants of land in this case were grants to the Railroad in fee simple that included an implied right of reverter to the United States under the rationale first espoused in Townsend and later embraced by 43 U.S.C. § 912. Second, § 913 expressly permits the Railroad to convey its strip of land to Bayfield County for use as a public highway. Thus, even if we did not find that the United States retained a right of reverter under the original grant, the Railroad's interest in the land is now properly vested in Bayfield County through the county's dedication of the land as a public recreational trail. Either way the Maulers have no legal interest in the former railroad corridor.

In Townsend the Supreme Court held that private individuals could not acquire title to railroad rights of way through adverse possession. 190 U.S. at 272. The Court reasoned that Congress' grant of federal lands conferred title only for the limited purpose of building a railroad through the public domain and that purpose could not be abandoned in favor of the railroad or any other private entity. Id. The Townsend Court thus concluded that the railroad grant was a "limited fee, made on an implied condition of reverter in the event

that the company ceased to use or retain the land for the purpose for which it was granted." Id.

The Maulers argue that Townsend is inapplicable to this case because the Townsend land grant included the words "right of way" where the land grant in this case does not. We find this to be a distinction without a difference. Nothing in the Townsend opinion suggests the Court intended to distinguish between a land grant for a "right of way . . . for the construction of a railroad" (the Townsend grant) and a land grant "for the purpose of aiding the construction of a railroad" (the grant in this case). Rather, the Townsend Court decided that Congress made all of its railroad land grants "in order that the obligations to the United States, assumed in the acceptance of the act, might be performed." 190 U.S. at 272. Because the land grants in this case were comprised of federal lands in the public domain and were given for exactly the same purpose as the grant in Townsend, we readily conclude that the strip of land at issue here was subject to an implied right of reverter in the United States.

Likewise, we find the strip of land subject to disposition under 43 U.S.C. § § 912, 913 and 16 U.S.C. § 1248(c). The language of § 912 ("public lands of the United States . . . granted to any railroad company for use as a right of way for its railroad") and § 913 ("all railroad companies to which grants for rights of way through the public lands have been made by Congress") plainly refers to all Congressional grants of public lands for railroad rights of way. Moreover, the legislative history of § 912 reveals that Congress enacted the law primarily to resolve title disputes with respect to abandoned and forfeited federal railroad lands of the type discussed in Townsend. S. REP. NO. 67-388 (1922); H.R. REP. NO. 67-217 (1921). And courts interpreting these statutes have consistently found other

Congressional grants of federal lands for railroad rights of way subject to disposition under § § 912 and 913. See, e.g., Vieux v. East Bay Reg'l Park Dist., 906 F.2d 1330 (9th Cir. 1990); Idaho v. Oregon Short Line R.R. Co., 617 F. Supp. 207 (D. Id. 1985); Marlow v. Malone, 315 Ill. App. 3d 807, 734 N.E.2d 195, 248 Ill. Dec. 487 (Ill. App. Ct. 2000). Clearly Congress assumed the United States possessed a reversionary interest in railroad rights of way, else it would make little sense for Congress to have passed laws like § § 912, 913 and § 1248(c) to dispose of land the federal government did not own.

Applying these federal statutes to the land in this case, we find that § 912, as modified by § 1248(c), vests a reversionary interest in the strip in the United States and not the Maulers. When the Railroad conveyed the strip to Bayfield County and Bayfield County established a public highway on the land as required by § 913, the United States' reversionary interest expired in favor of Bayfield County. In short, the Maulers never possessed a legal interest in the former railroad corridor.

Turning to the second issue on appeal, the Mauler's takings claim, we begin and end our analysis with our finding that the Maulers do not own the land they claim has been taken from them. The Maulers argue they have been denied their right to exclude the public from their land because of Bayfield County's "permanent physical occupation" of the former railroad corridor as a recreational trail. Because we find the Maulers do not have any legal interest in the land, we conclude as the district court did that they lack standing to pursue their constitutional due process challenge to Bayfield County's use of the strip as a public trail.

III. CONCLUSION

We find that 43 U.S.C. § 912, as modified by 16 U.S.C. § 1248(c), vests a reversionary interest in the strip of land in the United States and not the Maulers, that § 913 authorizes the Railroad's transfer of the land to Bayfield County and validates the county's use of the land as a public recreational trail, and that the Maulers' takings claim must fail because they hold no valid legal interest in the strip of land.

For these reasons we AFFIRM the district court's grant of summary judgment in favor of defendant-appellee Bayfield County.

Footnotes

n1 Union Pacific Railroad Company is a successor in interest to the Chicago and North Western Transportation Company, which was a successor in interest to the Chicago, St. Paul, Minneapolis and Omaha Railway Company, which had earlier merged with the company to whom the original state patent for the land was granted, the North Wisconsin Railroad Company.

n2 Section 912 declares that "whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after

the date of said decree or forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid . . . ." 43 U.S.C. § 912 (2000).

n3 Section 1248(c) provides that "any and all right, title, interest, and estate of the United States in all rights-of-way of the type described in the Act of March 8, 1922 (43 U.S.C. § 912), shall remain in the United States upon abandonment or forfeiture of such rights-of-way, or portions thereof, except to the extent that any such right-of-way, or portion thereof, is embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such Act." 16 U.S.C. § 1248(c) (2000).

n4 Section 913 states that "all railroad companies to which grants for rights of way through the public lands have been made by Congress, or their successors in interest or assigns, are hereby authorized to convey to any State, county, or municipality any portion of such right of way to be used as a public highway or street." 43 U.S.C. § 913 (2000).

n5 Both the 1856 and 1864 Acts of Congress giving the federal land to Wisconsin used the same language and both limited the manner in which the land was to be used, including that "the said railroads shall be and remain public highways." The state patent which conveyed the land in question was given by Wisconsin to the Railroad in fee simple "in pursuance of the said several Acts of Congress."

n6 In its brief Bayfield County argues the Railroad never officially abandoned the railway corridor, so the United States' reversionary interest in the land never vested. This argument is not challenged on appeal by the Maulers because they had argued that the United States held no reversionary interest at all, and title to the land automatically vested in the Maulers at the time the Railroad ceased using it as a railway. The district court rejected the Maulers' argument and found instead that the Railroad had authority to give away its interest in the land under § 913 even without seeking a formal declaration of abandonment, and Bayfield County satisfied the statute's public highway requirement by dedicating the land for use as a public recreational trail.

00-C-742-C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DOUGLAS R. MAULER and JUDITH A. MAULER,
Plaintiffs,

v.

BAYFIELD COUNTY, a political subdivision of the State of Wisconsin, and UNION PACIFIC RAILROAD COMPANY, a foreign railroad corporation,
Defendants.

December 4, 2001, Decided

COUNSEL:
For Plaintiffs: Jon Erik Kingstad, Woodbury, MN.

For Bayfield County, Defendant: Richard K. Nordeng, Stafford Rosenbaum, LLP, Madison, WI.

For Union Pacific Railroad Company, Defendant: Bruce A. Schultz, Coyne Niess Schultz Becker & Bauer, Madison, WI.

For State of Wisconsin (amicus brief), Defendant: Frank Remington, Assistant Attorney General, Madison, WI.

JUDGES:
BARBARA B. CRABB, District Judge.

OPINIONBY:
BARBARA B. CRABB

OPINION:

OPINION AND ORDER

In this civil action for declaratory relief, plaintiffs Douglas R. Mauler and Judith A. Mauler contend that defendant Union Pacific Railroad Company or its predecessors in interest abandoned the right-of-way that traverses their property and the reversionary rights should fall to them. Plaintiffs seek a declaration that the former railroad right-of-way traversing their property is "abandoned," thereby quieting the title to the right-of-way against defendants and vesting it in plaintiffs. Plaintiffs also seek a declaration that the Abandoned Railroad Right-of-Way Act of 1922, 43 U.S.C. § 912, was repealed by the National Trails System Improvement Act of 1988, 16 U.S.C. § 1248(c). Jurisdiction is present under 28 U.S.C. § 1331.

Presently before the court are plaintiffs' and defendant Bayfield County's cross-motions for summary judgment. Because I find that § 912 and § 1248(c) apply to the right-of-way, that the railroad conveyed the right-of-way for a public highway and that defendant county has established a public highway along the right-of-way, I conclude that plaintiffs have no legal title to or interest in the right-of-way. Further, I find that the National Trails System Improvement Act of 1988, 16 U.S.C. § 1248(c), does not "repeal" the Abandoned Railroad Right-of-Way Act of 1922, 43 U.S.C. § 912, but modifies it to the extent that the reversionary right to abandoned railroad rights-of-way no longer falls to the adjoining landowner but to the United States. Because plaintiffs have no legal interest in the right-of-way at issue, they lack standing to seek a declaration that the right-of-way has been "abandoned" within the meaning of 43 U.S.C. § 912. I will grant defendant Bayfield County's motion for summary judgment and deny plaintiffs' motion for summary judgment.

From the proposed findings of fact, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiffs Douglas R. Mauler and Judy A. Mauler reside in Bayfield County, Wisconsin, on land located at Section 35, Township 47 North, Range 6 West, Town of Keystone and traversed by a railroad right-of-way. Defendant Union Pacific Railroad Company is a foreign corporation with its principal place of business in Omaha, Nebraska. Defendant Bayfield County is a political subdivision of the State of Wisconsin.

B. Background

The abandoned railroad right-of-way at issue in this case, which I will refer to as "the strip," was originally a United States land grant to the State of Wisconsin transferred pursuant to the June 3, 1856 and the May 5, 1864 Acts of Congress. The 1856 Act granted to the State of Wisconsin:

> every alternate section of land designated by odd numbers for six sections in width on each side [of the railroad to be constructed] . . . "that the lands hereby granted shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever . . . [The lands granted to the State] shall be subject to the disposal of the legislature thereof, for purposes aforesaid, and no other; and the said railroads shall be and remain public highways

> for the use of the government of the United States. . . ."

The same language is adopted by reference in the 1864 Act. The Acts granted federal lands to the State of Wisconsin "for the purpose of aiding in the construction of a railroad." The grants do not contain the phrase "right of way" but limit the manner in which states could dispose of the grant property, providing that "the said railroads shall be and remain public highways. . . ."

In Wisconsin, railroads acquired interest in their rights-of-way by state patent, which included Section 35, as well as most other odd-numbered sections within ten miles of either side of the right-of-way. The State Act of 1874 authorized the North Wisconsin Railroad Company to receive a state patent. That company was subsequently consolidated with the Chicago, St. Paul, Minneapolis and Omaha Railway Company. In 1884, the State of Wisconsin conveyed Section 35, Township 47, North Range 6 to the Chicago, St. Paul, Minneapolis and Omaha Railway Company in fee simple, "in pursuance of the said several Acts of Congress." The Chicago, St. Paul, Minneapolis and Omaha Railway Company was a predecessor to the Chicago and North Western Transportation Company.

In November 1884, the Chicago and North Western conveyed Section 35 to a John Canfield with the following reservation:

> The said party of the first part [the Railroad], however, hereby expressly reserves to itself, its successors and assigns forever, the right to occupy a strip of land one hundred feet in width through, over, and across the premises granted as aforesaid, or any part thereof, the said strip to be included within two lines,

> each parallel with and distant 50 feet from, the center line of the railway of the party of the first part, as the same is now constructed and operated, or as the same may hereafter be located, constructed and operated. . . .

The Chicago and North Western occupied and used the 100 foot wide strip of land as a right-of-way for its railroad for many years. On February 28, 1978, the Interstate Commerce Commission authorized the abandonment of the line and discontinuance of service. No abandonment of the railroad line has yet been declared or decreed by a court of competent jurisdiction or by an Act of Congress. After the Interstate Commerce Commission certification, the Chicago and North Western discontinued railroad service on the line, removed the railroad tracks, ties, ballast and other structures from the strip and ceased paying taxes on the strip. On July 3, 1986, the State of Wisconsin Department of Transportation issued a Statement of Release in Interest. The statement provides that the state "releases any interest or right that it may have by virtue of Section 85.09, Wis. Stats., . . . [in the Railroad's] abandoned line," including the strip.

In May 1989, the Chicago and North Western conveyed the strip to the Bayfield County Snowmobile Alliance, a Wisconsin nonprofit corporation. In June 1989, the Alliance reconveyed the strip to defendant Bayfield County, which paid for the strip with public funds. The county maintains and patrols the strip as a snowmobile trail at public expense. The strip is promoted for public use by the defendant county and is used widely by the public as a snowmobile trail and for hiking, biking, horseback riding and other recreational uses.

C. The Strip

Plaintiffs believe that they are the legal owners of the land described as follows:

> The Southeast One-Quarter (SE 1/4) of the Northeast One-Quarter (NE 1/4), Section Thirty-five (35), Township Forty-seven (47), North Range Six (6) West; and
>
> North 360 feet of the Northeast Quarter (NE1/4) of the Southeast Quarter (SE 1/4), Section
>
> Thirty-five (35), Township Forty-seven (47), North Range Six (6) West.

The warranty deed that covers the majority of this land contains the following language: "Exception to warranties: Subject to and together with all easements, restrictions, reservations, and exceptions as may constitute or otherwise affect the chain of title to said premises." Plaintiffs acquired the remainder of the property through a quitclaim deed, which conveys the property described in the deed "less rights of way of record."

> Bisecting plaintiffs' land is a 100-foot-wide strip of land that is legally described as follows: A strip of land 100 feet in width extending over and across the East Half of the East Half of Section 35, Township 47 North, Range 6 West of the Fourth Principal Meridian, said strip of land being 50 feet in width on either side of the center line of the main track (now removed) of the Chicago, St. Paul, Minneapolis and Omaha Railway Company (now the Chicago and North Western Transportation Company), as said

> main track center line was originally located and established over and across said Section 35.

In the spring of 1997, plaintiffs erected and maintained a five foot high wooden barrier across a cleared path on the strip in order to prevent people from driving snowmobiles and all-terrain vehicles and hunting on their land and the strip. On November 28, 1997, Patricia Thornton of the Bayfield County Tourism and Recreation Department told plaintiffs to remove the barrier. Several days later, unidentified persons took down the barrier without plaintiffs' consent. Plaintiffs reconstructed the wooden barrier in the spring of 1998 and agreed to remove it in November 1998, after defendant Bayfield County filed a lawsuit against them.

On October 27, 1998, defendant Bayfield County filed an action in the Circuit Court for Bayfield County against plaintiffs, seeking a declaratory judgment that it has a legally valid interest in the strip and a right to use and maintain the strip as part of a snowmobile trail and an injunction enjoining plaintiffs from blocking the portion of the snowmobile trail crossing their property. On September 3, 1998, the circuit court issued an order in which it declared that defendant Bayfield County has a legally valid interest in the strip and a legal right to use and maintain the strip

> until such time as it has been declared or decreed by a court of competent jurisdiction of by Act of Congress to have been abandoned for use as a railroad right of way, and more than one years [sic] has passed after the date of such declaration or decree without a public highway having been legally established thereon [as provided in 43 U.S.C.

> § 912]. No such declaration or decree has been made to date, nor does the decision of the Court herein or this judgment constitute such a declaration or decree.

The circuit court also enjoined plaintiffs from blocking the snowmobile trail or otherwise interfering with the use or maintenance of the trail as long as defendant Bayfield County has a legally valid interest in the strip. Plaintiffs did not assert in the circuit court that the Abandoned Railroad Right-of-Way Act of 1922 had been repealed by the National Trails System Improvement Act of 1998 and the circuit court did not consider the issue. On appeal, the court of appeals affirmed the judgment, refusing to consider plaintiffs' argument that the Abandoned Railroad Right-of-Way Act of 1922 was inapplicable to the strip because plaintiffs had failed to raise the argument in the circuit court despite having had the opportunity to do so.

OPINION

A. Summary Judgment Standard

Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Weicherding v. Riegel, 160 F.3d 1139, 1142 (7th Cir. 1998). If the non-moving party fails to make a showing sufficient to establish the existence of an essential element on which that party will bear the burden of proof at trial, summary judgment for the moving party is proper. Celotex v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). When considering a motion for summary judgment, the court must examine the facts in the light most favorable to the non-moving party. Sample v. Aldi, Inc., 61 F.3d 544, 546 (7th Cir. 1995).

B. Prior Proceeding in State Court

This dispute between plaintiffs and defendant Bayfield County was the subject of a prior proceeding in state court. In that case, the Circuit Court for Bayfield County entered a judgment in favor of defendant Bayfield County, declaring that defendant has a legally valid interest in the strip, that defendant's interest continues at least until the railroad is declared abandoned by a court or Congress and that in the case of a decree of abandonment, rights to the strip are controlled by 43 U.S.C. § 912. Bayfield County v. Mauler, No. 98-CV-86. In the state court proceeding, plaintiffs argued that § 912 does not apply to the strip for the first time on appeal. The court of appeals declined to consider plaintiffs' argument because it had not been raised below. Although the issue presently before the court involves the same parties and the same dispute over the same strip of land, defendant Bayfield County has chosen not to assert the affirmative defense of issue preclusion. Deft.'s Br. in Support of Mo. for Summ. J., dkt. # 72, at 3.

The law of issue preclusion is intended to protect the parties from the burden of relitigating the same issue following a final judgment and to promote judicial economy by preventing needless litigation. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, 58 L. Ed. 2d 552, 99 S. Ct. 645 (1979). Because issue preclusion is an affirmative defense, the party asserting it has the burden of proving that the doctrine applies. Freeman United Mining Co. v. Office of Workers' Compensation Programs, 20 F.3d 289, 294 (7th Cir. 1994). (I note that claim preclusion is not available to defendant Bayfield County because it was the plaintiff and not the defendant in the state court proceeding. See Cannon v. Loyola Univ. of Chicago, 784 F.2d 777, 780 (7th Cir. 1986) (principle of claim preclusion provides

that plaintiff who has brought claim and had that claim resolved on merits cannot turn around and file same claim because initial result was unsatisfactory).)

Defendant Bayfield County would like this court to address the issue whether 43 U.S.C. § 912 applies to the strip for a practical reason: other property owners along the snowmobile trail could assert the same argument in the future, leaving the status of the trail in controversy. Rather than relitigating the issue at some future date, defendant Bayfield County has chosen to have the issue resolved in this case. Because defendant Bayfield County has waived the defense of issue preclusion, this federal prosecution is not barred by the previous state action.

C. Reversionary Interests under 43 U.S.C. § 912 and 16 U.S.C. § 1248(c)

1. Whether 16 U.S.C. § 1248(c) repeals 43 U.S.C. § 912

In 1922, Congress enacted 43 U.S.C. § 912 (Disposition of Abandoned Railroad Grants) as part of the Public Land Acts to insure that railroad rights-of-way would continue to be used for public transportation purposes. Vieux v. East Bay Regional Park Dist., 906 F.2d 1330, 1335 (9th Cir. 1990). Section 912 has been interpreted to apply to federal lands granted both before 1871 (interpreted as "limited fee with right of reverter") and after 1871 (interpreted as "exclusive easement"). Id.; Idaho v. Oregon Short Line R.R. Co., 617 F. Supp. 207, 210-11 (D.C. Idaho 1985).

43 U.S.C. § 912 addresses the disposition of federally granted rights-of-way that have been abandoned by the grantee railroad. A right-of-way is not considered forfeited or abandoned unless it has been "declared or decreed [so] by a court of competent jurisdiction or by Act of Congress." If a right-of-way in

which the United States holds a reversionary interest is declared "abandoned," § 912 directs that the interest transfer to the owner of the land traversed by the railroad line. This transfer is subject to exceptions. The reversionary rights extinguish and the transfer does not occur if a "public highway" is legally established on the right-of-way within one year of a declaration of forfeiture or abandonment. In addition, the transfer does not take place if the railroad company had already conveyed the right-of-way before abandoning it and that conveyance had been validated and confirmed by an Act of Congress.

Closely related to § 912, 43 U.S.C. § 913 authorizes railroads to convey their land grant rights-of-way for use as public highways or streets. Section 913 provides:

> All railroad companies to which grants for rights of way through the public lands have been made by Congress, or their successors in interest or assigns, are hereby authorized to convey to any State, county, or municipality any portion of such right of way to be used as a public highway or street: Provided, That no such conveyance shall have the effect to diminish the right of way of such railroad company to a less width than fifty feet on each side of the center of the main tract of the railroad as now established and maintained.

In 1958, Congress repealed the limitation that a railroad had to maintain fifty feet on either side of the centerline of the tract. 23 U.S.C. § 306; State of Idaho v. Oregon Short Line R. Co., 617 F. Supp. 219, 220 (D.C. Idaho 1985).

In 1988, Congress changed its stance regarding the disposition of abandoned federal grant railway lines. It

enacted 16 U.S.C. § 1248(c), adopted as part of the National Trails System Improvements Act of 1988, which was intended to encourage trail formation on former federal land grant rail corridors. Section 1248(c) states:

> Commencing [October 4, 1988], any and all right, title, interest, and estate of the United States in all rights-of-way of the type described in the act of March 8, 1922 (43 U.S.C. § 912), shall remain in the United States upon the abandonment or forfeiture of such rights-of-way, or portion thereof, except to the extent that any such right-of-way, or portion thereof, is embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such Act.

The statute changed the disposition of the federal interests involved, causing them to revert to the United States rather than to be transferred to adjacent landowners. At the same time, § 1248 reaffirmed the public highway exception of § 912.

Plaintiffs argue that 16 U.S.C. § 1248(c) repealed 43 U.S.C. § 912. Because § 1248(c) does not contain any language repealing § 912 explicitly, plaintiffs must be asserting that § 1248(c) had the effect of repealing § 912, or that it was an implied repeal. Plaintiffs are correct that § 1248(c) changed the scheme for the disposition of federal contingent interests in land grant rights-of-way. However, § 1248(c) supersedes only that portion of § 912 addressing the recipient of reversionary rights, rather than abrogating § 912 without adding a new section to replace it. "When a provision is withdrawn from a section, the legislatures call the act an amendment particularly when a provision is added to

replace the one withdrawn." Norman J. Singer, 1A Sutherland Statutory Construction § 23.02 (5th ed. 1992) (emphasis in original). Thus, § 1248(c) "amends" or "modifies" § 912 rather than "repealing" it.

Defendant points to the fact that since the passage of § 1248(c), at least one court has continued to recognize § 912 as a valid statute. See Vieux, 906 F.2d at 1335-37. Although I agree with defendant that § 912 remains a valid statute with the exception of the disposition of reversionary interests, it is unclear why the Court of Appeals for the Ninth Circuit did not address the effect of § 1248(c) on § 912; the case was decided in 1990, two years after § 1248(c) was enacted. In any case, in Vieux, the court determined that the landowner plaintiffs did not have a reversionary interest under § 912 because the railroad had conveyed the federal grant right-of-way to the county for use as a public highway and the county had established a public highway. Id. at 1342. The court was not called upon to decide the disposition of reversionary rights. I conclude that § 1248(c) does not repeal § 912, but modifies it only to the extent that the federal government's reversionary rights to the abandoned right-of-way no longer fall to the adjoining landowner but to the United States.

It is perplexing why plaintiffs argue for the repeal of § 912 when the "repeal" of § 912 (and replacement by § 1248(c)) leaves plaintiffs in a worse position. Under § 912, plaintiffs possessed a potential non-vested interest in the right-of-way: if the railroad were declared abandoned and if the right-of-way were not established as a public highway within one year of the declaration, then title would revert to plaintiffs. In contrast, under § 912, as modified by § 1248(c), plaintiffs do not possess even this potential reversionary interest. If the right-of-way were declared abandoned and a public highway were not established within one year of that declaration,

the interest would revert to the United States and not to plaintiffs. It may be that plaintiffs are trying to avoid both § 912 and § 1248(c) in order to assert their interest under common law. However, I have already determined that § 912, as well as § 1248(c), applies to the strip. That § 1248(c) modifies the disposition of the reversionary interest does not change the determination that both of these statutes address the type of land at issue here: "public lands of the United States...granted to any railroad company for use as a right of way for its railroad." 43 U.S.C. § 912.

2. Right of reverter

Plaintiffs argue that the strip is not subject to a right of reverter, rendering § 912 inapplicable, as well as § 913 and § 1248(c). Plaintiffs base this contention on the fact that the grant pursuant to which the federal land was originally granted to the Railroad does not state explicitly that the grant constitutes a "right-of-way" but instead is a grant of "lands" "in aid of railroad construction" for the purpose of establishing a public highway. According to plaintiffs, the United States intended to retain a reversionary right in explicit grants of "rights-of-way" but not for lands limited to the purpose of establishing a railroad. The distinction that plaintiffs try to draw is unpersuasive.

The Supreme Court has characterized the nature of land grants made to the railroads before 1871 as "limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purpose for which it was granted." Northern Pacific Railway Co. v. Townsend, 190 U.S. 267, 271, 47 L. Ed. 1044, 23 S. Ct. 671 (1903); see also Great Northern Railway Co. v. United States, 315 U.S. 262, 267, 86 L. Ed. 836, 62 S. Ct. 529 (1942) (distinguishing between limited grants before 1871 and easements after 1871). In

Townsend, 190 U.S. at 271, the grant did not state that it conveyed a "right-of-way" to the railroad. Instead, the grant contained a statement that the land could be used by the railroad only for the limited purpose of constructing and operating a railroad. The Court recognized that the United States has an interest in maintaining corridors for public transportation purposes. Id. The Court reasoned that because the railroad held a limited fee that it could not alienate in its discretion, the plaintiffs could not obtain an absolute, unlimited fee by adverse possession against the railroad. Id. at 272-73.

As in Townsend, the land grant under which the strip in this case was conveyed to the railroad was made for the limited purpose of constructing and operating a railroad. The grant states that the lands "shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever." Further, the grant recognized the long-term interest of the United States in the transportation corridor by limiting the manner in which the states could dispose of the federal land by stating that they "shall be and remain public highways." From the purpose of the grant and the conditions attached to the grant, I conclude that the United States intended to retain a reversionary interest in the strip just as it did in Townsend.

Plaintiffs assert that the reasoning in Townsend does not apply to this case but that Noble v. Oklahoma City, 297 U.S. 481, 80 L. Ed. 816, 56 S. Ct. 562 (1936), controls the outcome. Plaintiffs' reliance on the holding in Noble is misplaced. In Noble, the Supreme Court addressed the ownership rights to land that was part of a railroad line that had since been abandoned. In that case, the plaintiffs asserted that their predecessors in

interest had owned the land and had granted an easement to the railroad. Thus, the plaintiffs argued that the land should revert to them when the railroad was abandoned. The city asserted that the railroad had acquired the right-of-way by an act of Congress and, therefore, that the land should revert to the municipality. The Court found for the plaintiffs, holding that the federal act authorizing construction of the railroad did not include any implied right of reverter. Id. at 494.

Plaintiffs assert that in Noble, the Court found for the plaintiffs because the federal act granting rights to the railroad did not include an express grant of a "right-of-way." However, the Court determined that the act was not a land grant at all, but authorized a taking upon compensation. Id. In Noble, the lands over which the railroad had been constructed were not unrestricted federal lands as in this case, but lands owned by the Creek Indian tribe. The grant from the United States gave the railroad permission to exercise eminent domain powers to obtain land from the Creek. Therefore, in Noble, there was no right of reverter and the lands at issue were not subject to § 912. The chain of title of the strip at issue distinguishes this case from the circumstances in Noble. I conclude that the United States retains a right of reverter in the strip as in Townsend. Accordingly, the disposition of the reversionary interest in the strip is governed by 43 U.S.C. § 912.

Plaintiffs argue that applying § 912 to this case would raise constitutional problems because it would result in a taking of private property for public use without just compensation. However, the strip's chain of title shows just the opposite. The strip was public property at the outset and was granted subsequently to a private entity in the public interest to promote economic

development. The lands were given to the Railroad for the sole purpose of developing railroad rights-of-way. Those rights-of-way were to remain public highways for the use of the United States. Following Townsend, the restrictions placed on the grant demonstrate that Congress intended to retain a reversionary interest in the rights-of-way should they be abandoned. Through § 912, Congress merely provides for the disposition of the reversionary interest in public lands that it never relinquished. Therefore, the application of § 912 (or § 1248(c)) does not constitute a taking. In addition, as discussed below, plaintiffs lack standing to assert this claim because they do not have any reversionary interest in the strip.

D. Public Highway

Having established that 43 U.S.C. § 912 and 16 U.S.C. § 1248(c) apply to the strip, I must determine whether the public highway exception applies to the facts of this case. Section 1248(c) provides that any non-vested reversionary rights are extinguished if the right-of-way is "embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under [§ 912]." 16 U.S.C. § 1248(c). In addition, 43 U.S.C. § 913 authorizes railroads to convey federally granted rights-of-way "to be used as a public highway or street." In this case, the facts demonstrate that the strip has already been established as a public highway. Therefore, the Railroad had the authority to convey the strip to defendant Bayfield County through the Bayfield County Snowmobile Alliance.

State law determines the definition of a "public highway" for federal land grant statutes, including § § 912 and 913. Vieux, 906 F.2d at 1341; Standage Ventures, Inc. v. Arizona, 499 F.2d 248, 250 (9th Cir. 1974). Under Wisconsin law, the term "highway" includes "all public ways and thoroughfares and all bridges upon the same."

Wis. Stat. § 990.01(12). The Supreme Court of Wisconsin has interpreted the term "highway" broadly. Walker v. Green Lake County, 269 Wis. 103, 112, 69 N.W.2d 252, 257 (1955) ("The conception of highways is changing and it is now felt that highways established for the general benefit must admit of new methods of use whenever it is found that the general benefit requires it."); Heise v. Village of Pewaukee, 92 Wis. 2d 333, 348, 285 N.W.2d 859, 865 (1979) (strip of land used as roadway to lake for summer and winter sporting activities, fishing, boating and ice skating is "highway"); Hebert v. City of Richland Center, 264 Wis. 8, 11, 58 N.W.2d 461, 463 (1953) (pedestrian bridge is "highway").

Standing alone, the language of § 990.01(12) ("all public ways and thoroughfares") is broad enough to include recreational trails. This conclusion is strengthened by Wis. Stat. § 340.01(22), which provides that a "highway ... includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel...." A "vehicle" is "every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except railroad trains." Wis. Stat. § 340.01(74). A snowmobile is "an engine-driven vehicle that is manufactured solely for snowmobiling." Wis. Stat. § 340.01(58a). Defendant Bayfield County and Amicus Curiae State of Wisconsin assert that one or more types of vehicles use the strip traversing plaintiffs' property and, therefore, the current trail use is consistent with the Wisconsin concept of a public highway. I agree. The snowmobile trail is a permanent, public thoroughfare that falls within the definition of "highway" under Wisconsin law.

Plaintiffs rely on Green Bay & Western Railroad Co. v. Transportation Comm., 123 Wis. 2d 147, 365 N.W.2d 909 (Ct. App. 1985), for the proposition that a

snowmobile trail is not a "public highway." However, in Green Bay, the court limited the scope of its finding to the issue whether "snowmobile trails are 'highways' within the meaning of sec. 195.29(1)"; if they were, the Transportation Commission would have the authority to regulate railroad crossings of the trails. Id. at 149, 365 N.W.2d at 910. The court determined that because the public's right to use the snowmobile trails at issue in that case was "transient," stemming from a five-year easement over private farmland, the trails were not "public ways" and had not been established as "highways."Id. In this case, the Transportation Commission's authority is not at issue: the public's right to use the strip is not transient (there is no easement for a limited term); and the railroad corridor has been in use as a rail line or a recreational trail for over one hundred years. Because Green Bay raised a different issue, the holding in that case does not change the determination that the strip is a "highway" under Wisconsin law.

Defendant Bayfield County argues that the strip has been established as a public highway through common law dedication. Under Wisconsin law, the common law dedication of a highway requires an intention to dedicate expressed in some form and an acceptance of the dedication by the proper public authorities or by the general public. Poynter v. Johnston, 114 Wis. 2d 439, 447-48, 338 N.W.2d 484, 489 (1983); see also Galewski v. Noe, 266 Wis. 7, 13, 62 N.W.2d 703, 706 (1954) (deed reservations and map sufficient to show intent to dedicate, public use of street "whenever it was passable" sufficient to show acceptance). An intention to dedicate land for public use and an acceptance by the public are the essential elements of an absolute and complete dedication; the offer does not need to be expressed in writing or in any other particular format. Poynter, 114 Wis. 2d at 448, 338 N.W.2d at 489.

In this case, there has been an offer of the strip for public use and an acceptance by the public, thereby accomplishing an absolute and complete dedication. The railroad and after it, the Bayfield County Snowmobile Alliance, conveyed the strip to defendant Bayfield County for the purpose of establishing a public snowmobile trail. Defendant accepted the conveyance and recorded the deed. Defendant has expended public funds to develop and maintain the trail and to advertise its availability for public use. The public has used the strip in substantial numbers. Because these facts demonstrate an intent to dedicate and acceptance more definite than those in Galewski, I find that a public highway has been established by common law dedication. I need not address defendant Bayfield County's argument that the strip has been established as a public highway through prescription under Wis. Stat. § 80.01(2)(a).

E. Railroad's Right to Convey the Strip

Because the strip is an established public highway, the Railroad had the authority to convey the strip to defendant Bayfield County by way of the Bayfield County Snowmobile Alliance pursuant to 43 U.S.C. § 913, which authorizes railroads to convey their land grant rights-of-way for use as "public highways or streets." Plaintiffs assert that the Railroad did not have authority to convey the right-of-way to the Bayfield County Snowmobile Alliance under § 913, so the second conveyance to defendant county is invalid. However, I find the fact that the strip passed through the hands of the Snowmobile Alliance as an intermediary to be without consequence. This intermediary step does not change the fact that the Railroad conveyed the strip to be used as a public recreational trail, which I have already determined constitutes an established public highway.

Plaintiffs contend that the Railroad did not have the authority to convey its interest in the strip to the Bayfield County Snowmobile Alliance or to defendant Bayfield County. Plaintiff assert that when the Railroad conveyed land to John Canfield, their predecessor in interest, it conveyed the entirety of the land, including the strip, in fee simple, reserving for itself only the right to occupy the strip of land. According to plaintiffs, the Railroad's interest in the strip transferred to plaintiffs at the moment the Railroad stopped using the strip for railroad purposes. Plaintiffs rely on Pollnow v. State Dept. of Natural Resources, 88 Wis. 2d 350, 276 N.W.2d 738 (1979), in support of this proposition. In Pollnow, the court held that the railroad had no authority to convey a right-of-way to the Department of Natural Resources because the railroad's interest in the right-of-way reverted to the adjoining landowner when it ceased using the right-of-way for railroad purposes. Id. at 362, 276 N.W.2d at 744. In Pollnow, the court noted that the railroad did not obtain a grant of federal lands to construct a railroad but instead obtained an easement across the land of a private landowner who had been granted a patent to the land by the federal government. Id. at 355, 276 N.W.2d at 741. Because the railroad did not obtain an interest in the right-of-way through an act of Congress, the court turned to common law principles, under which land returns to the original owners or grantees when a railroad abandons an easement limited to railroad purposes. Id. at 362, 276 N.W.2d at 744. Thus, when the railroad abandoned the railway, its common law easement extinguished and it did not have the authority to convey the title to another party. Id. at 367, 276 N.W.2d at 746.

Despite plaintiffs' argument otherwise, the reasoning in Pollnow does not inform the outcome of this case. In Pollnow, the railroad did not obtain the right-of-way through a federal land grant, making it unnecessary for

the court to discuss anything other than common law principles regarding railroad easements; it did not address the federal statutes governing the disposition of federal lands conveyed to a railroad for railroad purposes. The court stated explicitly that it "made no holding as to the power of the Congress or the state Legislature to preserve the rights of the public in existing rail corridors for multiple public uses, including transportation, conservation or recreation." Id. at 367, 276 N.W.2d at 746. Because 43 U.S.C. § § 912 and 913 were not at issue in Pollnow, the court's reasoning applies only to common law dispositions of abandoned railroads and does not establish that the Railroad in this case did not have the authority to convey the right-of-way after it ceased using the strip for railroad purposes.

F. Judicial Decree of Abandonment

It is undisputed that there has never been a formal declaration of abandonment by either an act of Congress or a court of competent jurisdiction. Plaintiffs ask this court to make that declaration as a court of competent jurisdiction. However, defendant Bayfield County asserts that this court should refrain from making this determination because plaintiffs lack standing to ask for the declaration because plaintiffs possess no interest in the strip. Defendant Bayfield County itself has not asked for a ruling that the strip has been "abandoned" within the meaning of § 912.

Standing is the determination whether a specific person is the proper party to bring a matter to the court for adjudication. The "question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Warth v. Seldin, 422 U.S. 490, 498, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975). The Supreme Court has identified three constitutional standing requirements. The plaintiff must allege that: (1) she has suffered or imminently will suffer an injury; (2)

the injury is fairly traceable to the defendant's conduct; and (3) a favorable federal court decision is likely to redress the injury. Bennett v. Spear, 520 U.S. 154, 167, 137 L. Ed. 2d 281, 117 S. Ct. 1154 (1997). The Court has also identified prudential standing principles, one of which is relevant to this case: generally, a party may assert only her own rights and not the claims of parties not before the court. Allen v. Wright, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984).

I agree with defendant Bayfield County that plaintiffs lack standing to ask this court for a declaration that the strip is "abandoned." Plaintiffs have standing to bring this suit in the first instance; a determination that 43 U.S.C. § 912 or 16 U.S.C. § 1248(c) does not apply to the strip would likely redress plaintiffs' alleged injury by quieting title to the strip in plaintiffs. However, once I determined that these statutes apply to the strip and control its disposition, I concluded that the Chicago and North Western had the authority to convey the strip (as an established public highway) to defendant Bayfield County by way of the Bayfield County Snowmobile Alliance. Because I determined that plaintiffs do not have an interest in the strip, plaintiffs no longer have standing to ask for a declaration that the strip has been "abandoned." Regardless whether the strip is declared abandoned, it is an established public highway that was conveyed properly by the Railroad. This finding is reinforced by defendant's argument that a ruling on abandonment would be meaningless because a public highway has already been established on the strip. Thus, plaintiffs fail the third constitutional standing requirement: they cannot show that a favorable decision by this court is likely to redress their alleged injury. Bennett, 520 U.S. at 167.

In addition, plaintiffs fail one of the prudential standing requirements. Because I have determined that

43 U.S.C. § 912, as modified by 16 U.S.C. § 1248(c), controls the disposition of the strip, if the conveyance by the Railroad were not proper, the strip would revert to the United States, and not plaintiffs. Thus, by asking for a declaration that the strip is "abandoned," plaintiffs are asserting the rights of the United States, a party not before the court. Allen, 468 U.S. at 751.

ORDER

IT IS ORDERED that

1. Defendant Bayfield County's motion for summary judgment against plaintiffs Douglas R. and Judith A. Mauler is GRANTED.

2. Plaintiffs' motion for summary judgment is DENIED.

3. The parties may have until December 17, 2001, in which to inform the court whether there remain any claims against defendant Union Pacific Railroad Company. If this court receives no response by that date, the clerk of court is directed to enter judgment for defendants and close this case.

Entered this 4ht day of December, 2001.

BY THE COURT:

BARBARA B. CRABB

District Judge

No. 02-1358

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DOUGLAS A. MAULER and JUDITH A. MAULER,
Plaintiffs-Appellants,

v.

BAYFIELD COUNTY, a political subdivision
of the State of Wisconsin,
Defendants-Appellees.

November 25, 2002, Decided

JUDGES:

Before Hon. JOEL M. FLAUM, Chief Judge, Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon. KENNETH F. RIPPLE, Circuit Judge.

OPINION:

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed in the above-entitled case on November 12, 2002, by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

Sec. 1346. –United States as defendant

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

Sec. 2409a. - Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(e) If the United States disclaims all interest in the real

property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

16 U.S.C. § 1248 (c) Easements and rights-of-way

Commencing upon October 4, 1988, any and all right, title, interest, and estate of the United States in all right-of-way of the type described in the Act of March 8 1922 (43 U.S.C. 912), shall remain in the United States upon the abandonment or forfeiture of such rights of way, or portions thereof, except to the extent that any such right-of-way, or portion thereof, is embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such Act.

(d) Location, incorporation, and management

(1) All rights-of-way, or portions thereof, retained by the United States pursuant to subsection (c) of this section which are located within the boundaries of a conservation system unit or a National Forest shall be added to and incorporated within such unit or National Forest and managed in accordance with applicable

provisions of law, including this chapter.

(2) All such retained rights-of-way, or portions thereof, which are located outside the boundaries of a conservation system unit or a National Forest but adjacent to or contiguous with any portion of the public lands shall be managed pursuant to the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.) and other applicable law, including this section.

(3) All such retained rights-of-way, or portions thereof, which are located outside the boundaries of a conservation system unit or National Forest which the Secretary of the Interior determines suitable for use as a public recreational trail or other recreational purposes shall be managed by the Secretary for such uses, as well as for such other uses as the Secretary determines to be appropriate pursuant to applicable laws, as long as such uses do not preclude trail use.

(e) Release and quitclaim; conditions; sale; proceeds

(1) The Secretary of the Interior is authorized where appropriate to release and quitclaim to a unit of government or to another entity meeting the requirements of this subsection any and all right, title, and interest in the surface estate of any portion of any right-of-way to the extent any such right, title, and interest was retained by the United States pursuant to subsection (c) of this section, if such portion is not located within the boundaries of any conservation system unit or National Forest. Such release and quitclaim shall be made only in response to an application therefor by a unit of State or local government or another entity which the Secretary of the Interior determines to be legally and financially qualified to manage the relevant portion for public recreational

purposes. Upon receipt of such an application, the Secretary shall publish a notice concerning such application in a newspaper of general circulation in the area where the relevant portion is located. Such release and quitclaim shall be on the following conditions:

(A) If such unit or entity attempts to sell, convey, or otherwise transfer such right, title, or interest or attempts to permit the use of any part of such portion for any purpose incompatible with its use for public recreation, then any and all right, title, and interest released and quitclaimed by the Secretary pursuant to this subsection shall revert to the United States.

(B) Such unit or entity shall assume full responsibility and hold the United States harmless for any legal liability which might arise with respect to the transfer, possession, use, release, or quitclaim of such right-of-way.

(C) Notwithstanding any other provision of law, the United States shall be under no duty to inspect such portion prior to such release and quitclaim, and shall incur no legal liability with respect to any hazard or any unsafe condition existing on such portion at the time of such release and quitclaim.

(2) The Secretary is authorized to sell any portion of a right-of-way retained by the United States pursuant to subsection (c) of this section located outside the boundaries of a conservation system unit or National Forest if any such portion is -

(A) not adjacent to or contiguous with any portion of the public lands; or

(B) determined by the Secretary, pursuant to the

disposal criteria established by section 203 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1713), to be suitable for sale.

Prior to conducting any such sale, the Secretary shall take appropriate steps to afford a unit of State or local government or any other entity an opportunity to seek to obtain such portion pursuant to paragraph (1) of this subsection.

(3) All proceeds from sales of such retained rights of way shall be deposited into the Treasury of the United States and credited to the Land and Water Conservation Fund as provided in section 460l-5 of this title.

(4) The Secretary of the Interior shall annually report to the Congress the total proceeds from sales under paragraph (2) during the preceding fiscal year. Such report shall be included in the President's annual budget submitted to the Congress.

(f) "Conservation system unit" and "public lands" defined

As used in this section -

(1) The term "conservation system unit" has the same meaning given such term in the Alaska National Interest Lands Conservation Act (Public Law 96-487; 94 Stat. 2371 et seq.), except that such term shall also include units outside Alaska.

(2) The term "public lands" has the same meaning given such term in the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.)

43 U.S.C. § 912 Disposition of abandoned or forfeited railroad grants

Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established after the date of said decree or forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns, successors in title and interest to whom or to which title of the United States may have been or may be granted conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid, except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever *Provided*, that this section shall not affect conveyances made by any railroad company of portions of its right of way if such conveyances be among those which have been made or may after March 8, 1922, and before such forfeiture or abandonment be validated and confirmed by any Act of Congress; nor shall this section affect any public highway on said right of way on March 8, 1922: *Provided further*, That the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other

minerals in the land so transferred and conveyed, with the right to prospect for, mine and remove same.

43 U.S.C. § 913 Conveyance of land grant railroads of portions of rights of way to State, county or municipality

All Railroad companies to which grants for right of way through the public lands have been made by Congress, or their successors in interest or assigns, are hereby authorized to convey to any State, county, municipality any portion of such right of way to be used as a public highway or street: *Provided.* That no such conveyance shall have the effect to diminish the right of way to a less than 50 feet on each side of the center of the main track of the railroad as now established and maintained.

Supreme Court, U.S.
FILED
APR 8 2003
CLERK

No. 02-1316

IN THE

Supreme Court of the United States

DOUGLAS A. MAULER and JUDITH A. MAULER,

Petitioners,

v.

BAYFIELD COUNTY, a political subdivision of the State of Wisconsin,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
RESPONSE TO QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	5
REASONS FOR DENYING THE PETITION	7
I. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT.	8
II. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT GOVERNING RETROACTIVE APPLICATION AND IMPLIED REPEAL OF STATUTES.	9
III. THERE IS NO CONFLICT BETWEEN THE CIRCUITS AND THE HIGHEST COURTS OF SEVERAL STATES.	12
IV. THERE HAS BEEN NO "TAKING" OF LAND BELONGING TO THE MAULERS.	14
CONCLUSION	15

TABLE OF CITED AUTHORITIES

Page

Cases

Barney v. Burlington Northern R.R. Co., 490 N.W.2d 726 (S.D. 1992), *cert. denied*, 507 U.S. 914 (1993) 10

Delta Air Lines v. August, 450 U.S. 346 (1981) ... 2

King County v. Burlington Northern R.R. Corp., 885 F. Supp. 1419 (W.D. Wash. 1994) 11

Marshall v. Chicago & Northwestern Transp. Co., 31 F.3d 1028 (10th Cir. 1994) 12

Noble v. Oklahoma City, 297 U.S. 481 (1936) 8, 9

Northern Pacific Ry. Co. v. Townsend, 190 U.S. 267 (1903) 7, 8, 14

Phillips Co. v. Denver and Rio Grande Western R.R. Co., 97 F.3d 1375 (10th Cir. 1996 ..... 12, 13

Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) 13

Vieux v. East Bay Regional Park Dist., 906 F.2d 1330 (9th Cir. 1990) 11, 13

Cited Authorities

Page

United States Constitution

Fifth Amendment 3

Fourteenth Amendment 3

Article I, section 9, clause 3 1

Statutes

16 U.S.C. § 1248 ..... *passim*

16 U.S.C. § 1248(c)-(f) 1, 2

16 U.S.C. § 1248(c) ..... *passim*

28 U.S.C. § 1291 5

28 U.S.C. § 1331 ..... 4, 5

28 U.S.C. § 1346(f) 4

28 U.S.C. § 2201 4

28 U.S.C. § 2202 4

28 U.S.C. § 2409a 3, 4, 7

28 U.S.C. § 2409a(e) 7

Cited Authorities

Page

43 U.S.C. § 912 ..... *passim*

43 U.S.C. § 913 ..... *passim*

Other Authority

Cong. R. House 8046 (May 13, 1920) 10

RESPONSE TO QUESTIONS PRESENTED

The Maulers suggest in their introduction to the "Questions Presented" that the right of way at issue was "abandoned before October 4, 1988." This misstates the record. As explained in detail below (Section II), there has been no "abandonment" of the right of way, as that term is used in the applicable statutes. The Maulers' assertion that there has been an abandonment illustrates that the Maulers' case continues to be one in search of a theory, making it a poor candidate for consideration by this Court.

This case dealt with the application of well-settled law to land grants specific to the State of Wisconsin. It has no potential to "unsettle the title and ownership of more than 100,000 miles of railroad right of way," as the Maulers assert.

Each of the Maulers' Questions Presented is repeated below, followed by Bayfield County's response.

***Maulers' Question 1*:**

Does the National Trail System Improvement Act of 1988, Public Law 100-170, 102 Stat. 2281(1988), 16 U.S.C. § 1248(c)-(f) constitute a deprivation [of] private property without due process of law in violation of the U.S. Constitution, Amendment V or Ex Post Facto legislation in violation of Article I, section 9, clause 3 of the U.S. Constitution?

***County's Response*:**

At no prior stage in this case did the Maulers plead or argue that section 1248 was ex post facto legislation. Questions presented in a petition but not raised in the court

of appeals are not properly before this Court. *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981). In any event, it appears from the argument in the Petition that the Maulers do not actually question the constitutionality of section 1248, but rather claim that the statute was improperly applied to their situation. This argument raises no issue of national interest.

***Maulers' Question 2*:**

Is a railroad right of way created by a prior conveyance or by the General Right of Way Act of 1875 "right of way of the type described in the Act of March 8, 1922 (43 U.S.C. § 912)" and therefore owned by the United States under the National Trail System Improvement Act of 1988, Public Law 100-170, 102 Stat. 2281 (1988), 16 U.S.C. § 1248(c)?

***County's Response*:**

Question 2 is unclear. Moreover, "ownership" of the railroad right of way by the United States has never been an issue.

***Maulers' Question 3*:**

Did the National Trail System Improvement Act of 1988 Public Law 100-170, 102 Stat. 2281 (1988), 16 U.S.C. §§ 1248(c)-(f) impliedly repeal the Act of March 8, 1922, ch. 94, 42 Stat. 414 (43 U.S.C. § 912) and the May 25, 1920, ch. 197, 41 Stat. 621 (43 U.S.C. § 913)?

***County's Response*:**

Question 3 raises no issue requiring review. There is no split between the circuits on the issue of whether 16 U.S.C. § 1248 repealed 43 U.S.C. § 912 or 43 U.S.C. § 913. Rather,

the circuit courts uniformly recognize the continued viability of 43 U.S.C. §§ 912 and 913, even after the enactment of 16 U.S.C. § 1248.

***Maulers' Question 4*:**

Is the conversion [of] an abandoned railroad right of way to a recreational trail a taking without just compensation contrary to the U.S. Constitution, Amendments V and XIV?

***County's Response*:**

Question 4 is overly general and cannot be answered as posed. The answer depends upon the nature of the right of way and the circumstances of the conversion, as is illustrated by the Seventh Circuit's decision in this case. The answer further turns on the application of well-settled law to the specific facts. Review by this Court therefore would not add to the development of the law.

***Maulers' Question 5*:**

Is an abutting landowner entitled to quiet title and just compensation against a local government claiming title to abandoned railroad right of way under the United States where the United States disclaims all right, title and interest in such right of way under the Quiet Title Act, 28 U.S.C. § 2409a?

County's Response:

Question 5 implies that the United States disclaimed its interest in the right of way *before* title to the right of way vested in Bayfield County. This implication is incorrect.

The United States disclaimed its interest only *after* title was vested in Bayfield County and *after* the United States had no further interest in the property. The disclaimer thus operated merely to clarify that the United States had no continuing interest in the litigation and could be dismissed as a party, which is what occurred.

STATEMENT OF THE CASE

Bayfield County has established a public snowmobile trail on a railroad corridor that it acquired in 1989 from the Chicago and North Western Railroad. After the trail was established, Douglas and Judith Mauler purchased property in Bayfield County upon which a portion of the trail is located. Expressly excluded from the land conveyed to the Maulers was the 100-foot wide railroad corridor. The railroad retained the corridor when it conveyed the adjoining land to the Maulers' predecessor in interest. It subsequently conveyed the corridor to Bayfield County.

For years, the corridor has been openly marked and used by the public for snowmobiling and other public highway purposes. Now the Maulers claim title to the corridor under Wisconsin law.

The Court of Appeals for the Seventh Circuit correctly ruled that federal law controls and that Bayfield County is the rightful owner of the land. The Maulers have no legal interest in the land, and never did.

The Maulers assert that jurisdiction in the district court was founded on 28 U.S.C. §§ 1346(f) and 2409a and that jurisdiction in the court of appeals was founded on 28 U.S.C. §§ 1331, 2201, and 2202. Petition at 9. This assertion is

incorrect. The district court's jurisdiction was based on 28 U.S.C. § 1331. *Mauler v. Bayfield County,* 204 F. Supp. 2d 1168, 1170 (W.D. Wis. 2001). The Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

Respondent Bayfield County respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 309 F.3d 997 (7th Cir. 2002).

STATEMENT OF FACTS

The land at issue was at one time public land owned by the United States. (R73, ¶ 1.) The United States granted the land to the State of Wisconsin by acts of Congress passed in 1856 and 1864 "for purposes of aiding in the construction of a railroad," including a rail line to Bayfield, Wisconsin. (R73, ¶ 4.) The granting language is particularly important. The 1856 Act granted to the State of Wisconsin:

> every alternate section of land designated by odd numbers for six sections in width on each side of [the railroad to be constructed]. . . . "that *the lands hereby granted shall be exclusively applied in the construction of that road* for which it was granted and selected, and shall be disposed of only as the work progresses, and the same *shall be applied to no other purpose whatsoever*. . . . [The lands granted to the State] shall be subject to the disposal of the legislature thereof, for the purposes aforesaid, and no other; and *the said railroads shall be and remain public highways for the use of the government of the United States*. . . ."

(Emphasis added.) (R73, ¶ 5.)

The same language is adopted by reference in the 1864 Act. (R73, ¶ 5.)

The grants were accepted and implemented by acts that the Wisconsin state legislature passed in 1856 and 1874 and by the issuance of a state patent to a railroad company in 1884.[1] (R73, ¶ 2.) The patent granted to the Railroad included section 35, Township 47, Range 6. The strip of land at issue is located in this section. (R73, ¶ 2.)

Thereafter, in November, 1884, the Railroad conveyed section 35 to a John Canfield by warranty deed, with the following reservation:

> The party of the first part [the Railroad], however, hereby expressly reserves unto itself, its successors and assigns forever, the right to occupy a strip of land 100 feet in width through, over, and across the premises granted as aforesaid, or any part thereof, the said strip to be included within two lines, each parallel with, and distant 50 feet from, the center line of the railway of the party of the first part, as the same is now constructed and operated, or as the same may hereafter be located, constructed and operated. . . .

(R73, ¶ 6.)

On May 25, 1989, the Railroad conveyed to the Bayfield County Snowmobile Alliance its reserved interest in the

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1. That railroad company was the predecessor to the Chicago and North Western Transportation Company, one of the original defendants in this case. (R73, ¶ 3.) For convenience, the railroad companies are referred to collectively in this brief as "the Railroad."

property it had earlier deeded to John Canfield. (R73, ¶ 7.) The Alliance in turn conveyed the interest to the County on June 28, 1989. (R73, ¶ 7.) The County acquired its interest using public funds made available to it by the State of Wisconsin. (R73, ¶ 9.)

In 1994 and 1996, Douglas and Judith Mauler purchased property in section 35 in the Town of Keystone upon which a portion of the snowmobile trail is located. (R54, ¶ 6.) The 1994 deed conveyed a portion of section 35 to the Maulers, "Subject to and together with all easements, restrictions, reservations and exceptions as may constitute or otherwise affect the chain of title to said premises." (R73, ¶ 12.) A 1996 deed to the Maulers, for an additional portion of section 35, expressly conveyed the property described in that deed, "Less Rights of Way of Record." (R73, ¶ 12.)

On June 28, 2001, the Bureau of Land Management, on behalf of the United States, filed with the district court a disclaimer of interest in the strip of land at issue, as authorized by 28 U.S.C. § 2409a(e). (R48.)

Contrary to what the Maulers imply in their Petition, abandonment of the railroad line has never been declared or decreed by a court of competent jurisdiction or by an Act of Congress. (R73, ¶ 8.)

REASONS FOR DENYING THE PETITION

Review in this Court is unnecessary because the Court's prior decision in *Northern Pacific Ry. Co. v. Townsend*, 190 U.S. 267 (1903) controls. There is no constitutional issue, no issue of the retroactive application of a law, and no issue

of a conflict between circuits or between the decisions of this Court and the courts of any state.

I. The Seventh Circuit's Decision Does Not Conflict With Relevant Decisions Of This Court.

Both the Seventh Circuit and the district court had no difficulty concluding that this case is controlled by *Townsend*. The grants by which the Railroad obtained the land at issue conveyed, in the parlance of *Townsend*, "a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted." *Id.* at 271. Because the land grants retained a reversionary interest in the United States, federal law (not state law) controls the disposition of the lands. *See* 43 U.S.C. § 912 and 16 U.S.C. § 1248.

The Maulers assert that the Seventh Circuit's decision conflicts with this Court's decision in *Noble v. Oklahoma City*, 297 U.S. 481 (1936), and thus requires review. There is no conflict. A correct reading of *Noble* shows that it has no application to this case.

The issue in *Noble* was whether the federal acts involved there vested the railway with title to an interest in land (a right of way) which was subsequently abandoned. *Id.* at 487-88. If the acts at issue granted a present interest in land, the possibility arose that there would be a right of reverter to the United States upon abandonment by the railroad. The Court held that the legislation at issue "granted a franchise, authorized a taking upon compensation secured or made, and *was not a grant of land*." *Id.* at 494 (emphasis added). Therefore, there was no right of reverter and the lands at issue were not subject to section 912.

The grants at issue here clearly were land grants, making this case easily distinguishable from *Noble*.

II. The Seventh Circuit's Decision Does Not Conflict With Decisions Of This Court Governing Retroactive Application And Implied Repeal Of Statutes.

In their Petition, the Maulers argue for the first time that 16 U.S.C. § 1248(c) cannot be applied "retroactively" to their situation. They assert that section 1248(c), by its terms, applies "[c]ommencing upon October 4, 1988" and that the "strip of land traversing the petitioners' land was abandoned as a right of way as of July 3, 1986." Petition at 19. This timing, according to the Maulers, means that the law that applied to the strip was 43 U.S.C. § 912, not 16 U.S.C. § 1248(c). Under section 912, the County had one year after abandonment—which the Maulers say occurred on July 3, 1986—to establish a public highway on the strip. Because the County did not do so, the Maulers claim that the strip became the property of their predecessor in interest under state law as of July 3, 1987. Accordingly, so say the Maulers, the Seventh Circuit was wrong when it applied section 1248(c) retroactively, thus reviving the reversionary interest of the United States which had been extinguished in 1987.

The Maulers' retroactivity argument is based on a misstatement of the record. The strip of land at issue was not abandoned as a right of way as of July 3, 1986, as the term "abandoned" is used in sections 912 and 1248. The abandonment which triggers the need to establish a public highway within the specified time is an abandonment "declared or decreed by a court of competent jurisdiction or

by Act of Congress." 43 U.S.C. § 912. The National Trails System Improvement Act of 1988 incorporates this definition by referring to "a determination of abandonment or forfeiture, as provided under [43 U.S.C. § 912]."[2] 16 U.S.C. § 1248(c).

As the Maulers know, the absence of a declaration or decree of abandonment relating to the right of way at issue in this case is undisputed. *Mauler*, 204 F. Supp. 2d at 1172 ("It is undisputed that there has never been a formal declaration of abandonment by either an Act of Congress or a court of competent jurisdiction.") Indeed, the Maulers asked the district court to issue such a declaration or decree, but the court refused, on the grounds that the Maulers had no standing to make the request. *Id.* at 1180. On appeal to the Seventh Circuit, the Maulers did not challenge the district court's conclusion that there has been no declaration or decree of abandonment. *Mauler v. Bayfield County*, 309 F.3d 997, 1002 n.6 (7th Cir. 2002) ("In its brief, Bayfield County argues the Railroad never officially abandoned the railway corridor, so the United States' reversionary interest in the land never vested. This argument is not challenged on appeal by the Maulers. . . .").

The July 3, 1986 date cited by the Maulers as the supposed "abandonment" date is the date on which the State of Wisconsin Department of Transportation released its interest in the right of way. This, however, is not a judicial decree, nor is it an Act of Congress. It therefore does

2. Congress enacted this requirement because it did not want to leave the matter of abandonment to the unfettered discretion of the railroad companies or abutting landowners. *See* Cong. R. House 8046 (May 13, 1920), *quoted in Barney v. Burlington Northern R.R. Co.*, 490 N.W.2d 726, 731-32 (S.D. 1992), *cert. denied*, 507 U.S. 914 (1993).

not constitute a declaration or decree of abandonment, within the meaning of sections 912 and 1248. *Mauler*, 204 F. Supp. 2d at 1180.

Because there was no declared or decreed abandonment of the corridor, title to the corridor never vested in the Maulers' predecessor in interest by operation of section 912 and state law. Nor did title vest in the United States under section 1248(c). Rather, title to the corridor remained in the Railroad under federal law, and the Railroad was authorized by 43 U.S.C. § 913 to convey the corridor to a municipality (such as the County) for use as a public highway. The district court found that the County has established a public highway on the corridor. *Mauler*, 204 F. Supp. 2d at 1178-79. Upon establishment of a public highway, the contingent reversionary interest of the United States in the corridor was extinguished. *See Vieux v. East Bay Regional Park Dist.*, 906 F.2d 1330, 1337 (9th Cir. 1990) ("Under the exceptions clause [in section 912], non-vested reversionary rights can be extinguished if a public highway is legally established within one year of a decree of abandonment or forfeiture. . . ."); *King County v. Burlington Northern R.R. Corp.*, 885 F. Supp. 1419, 1425 (W.D. Wash. 1994) (public highway may be established even before any declaration of abandonment). Accordingly, the County now owns the land. *Vieux*, 906 F.2d at 1342 (establishment of a public highway vested ownership of the right of way with the County).

On June 28, 2001, the Bureau of Land Management filed a disclaimer of interest on the part of the United States. (R48.) The Government's willingness to disclaim any interest is understandable given that its contingent reversionary interest was extinguished when the County established a public highway on the rail corridor before a formal declaration of abandonment.

In summary, because there has been no "abandonment" of the right of way, the Maulers' entire discussion of a retroactivity issue is irrelevant and warrants no further review.

The Maulers also suggest that 16 U.S.C. § 1248(c) implicitly "repealed" sections 912 and 913 prospectively from October 4, 1988. There was no repeal. Rather, section 1248(c) modified section 912 to the extent that a reversionary right to an *abandoned* railroad right of way falls to the United States, not the adjoining landowner. In any event, in the absence of a properly declared abandonment, this point is moot.

III. There Is No Conflict Between The Circuits And The Highest Courts Of Several States.

The Maulers assert that the Seventh Circuit's decision conflicts with *Marshall v. Chicago & Northwestern Transp. Co.*, 31 F.3d 1028, 1030 (10th Cir. 1994) and *Phillips Co. v. Denver and Rio Grande Western R.R. Co.*, 97 F.3d 1375 (10th Cir. 1996). To further stir the pot, they claim that *Phillips* conflicts with *Vieux*. Petition at 24-25. The Maulers again fail to recognize the factual distinctions that separate these cases from one another and from the present case.

Marshall involved a right of way which was declared abandoned by a decree entered by the district court. *Marshall*, 31 F.3d at 1031. There has never been such a decree or declaration in this case. *Mauler*, 204 F. Supp. 2d at 1080-81.

The court in *Phillips* held that authorization from the Interstate Commerce Commission to abandon a railroad line was a prerequisite to a court's determination that the railroad

had abandoned the right of way for purposes of section 912. 97 F.3d at 1377. There is nothing novel about this, nor does it conflict with any portion of the Seventh Circuit's decision in this case. Indeed, whether ICC approval was a prerequisite for abandonment was not even an issue in this case, where it is undisputed that there has been no declaration or decree of abandonment.

Finally, there is no conflict between *Phillips* and *Vieux*. Like the court in *Phillips*, the court in *Vieux* recognized that a railroad may abandon part of a rail line with the authorization of the ICC. Like *Phillips*, *Vieux* held that the ICC does not determine whether a right of way has been abandoned for purposes of section 912. Rather, abandonment must be declared or decreed by a court of competent jurisdiction or an Act of Congress. *Vieux*, 906 F.2d at 1338.

In summary, there is no relevant conflict between the circuits.

Finally, the Maulers assert that there is a conflict between the Seventh Circuit's decision and *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996). They claim that the Seventh Circuit adopted a "shifting public use doctrine" contrary to *Preseault* and to the law of the States of Vermont, Wisconsin and Washington.

The doctrine of shifting public use has no application here. *Preseault* involved *private* lands over which the railroad obtained an easement through a grant of the right of eminent domain. 100 F.3d at 1534-35. Significantly, there was no grant of *federal* lands to the railroad in *Preseault* and thus no issue of whether the United States had retained a reversionary interest in the land.

IV. There Has Been No "Taking" Of Land Belonging To The Maulers.

The Maulers contend that application of sections 912, 913 and 1248 to the present situation raises constitutional problems because, according to the Maulers, these sections authorize the taking of private property for public use without compensation. Not so. What happened in this case was that public property (public lands of the United States) was given for a private use (railroad) because to do so was deemed by Congress to be in the public interest to promote economic development. But the grant of public lands was not without restriction. The lands were given for the sole purpose of developing railroad rights of way over the public lands and those rights of way were to remain public highways for the use of the United States. Under the rationale of *Townsend*, these restrictions show the intent of Congress to retain a reversionary interest in the right of way if it should ever be abandoned. Sections 912, 913, and 1248 merely provide for the disposition of that interest. There was no taking of land from the Maulers because they never had any legal interest in the land.

CONCLUSION

For the reasons stated, respondent Bayfield County respectfully requests that the Court deny the Petition.

Respectfully submitted,

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